

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
BEAUMONT DIVISION

UNITED STATES OF AMERICA )	
ex rel. BROOK JACKSON, )	
Plaintiff, )	Case No.
	1:21-CV-00008
vs. )	
VENTAVIA RESEARCH GROUP, )	
LLC; PFIZER, INC.; ICON, )	Beaumont, Texas
PLC, )	
Defendants. )	

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TRANSCRIPT OF MOTION HEARING  
May 1, 2024  
BEFORE THE HONORABLE MICHAEL J. TRUNCALE  
UNITED STATES DISTRICT COURT

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APPEARANCES:

For the Plaintiff:

MR. ROBERT E. BARNES  
Barnes Law  
700 South Flower Street, Suite 1000  
Los Angeles, California 90017  
robertbarnes@barneslawllp.com

MR. JEREMY L. FRIEDMAN  
Law Office of Jeremy L. Friedman  
2801 Sylhowe Road  
Oakland, California 94602  
jlfried@comcast.net

MR. WARNER MENDENHALL  
The Law Offices of Warner Mendenhall  
190 North Union Street, Suite 201  
Akron, Ohio 44304  
warner@warnermendenhall.com

\*\*\*\*\*

APRIL HARGETT, CSR, RPR, RVR  
Federal Official Court Reporter  
300 Willow Street  
Beaumont, Texas 77701

1 APPEARANCES (Continued):

2 For the Defendant Ventavia Research Group, LLC:

3 MS. TARYN M. MCDONALD  
4 Haynes and Boone, LLP  
5 2801 North Harwood Street, Suite 2300  
6 Dallas, Texas 75201  
7 taryn.mcdonald@haynesboone.com

8 For the Defendant Pfizer, Inc.:

9 MS. MEAGAN D. SELF  
10 DLA Piper LLP - Dallas  
11 1900 North Pearl Street, Suite 2200  
12 Dallas, Texas 75201  
13 meagan.self@dlapiper.com

14 MR. CARLSON WESSEL  
15 DLA Piper LLP - Washington  
16 500 Eighth Street Northwest  
17 Washington, D.C. 20004  
18 carlton.wessel@us.dlapiper.com

19 MR. JACK P. CARROLL  
20 Orgain, Bell & Tucker LLP - Beaumont  
21 470 Orleans Street, Suite 400  
22 Beaumont, Texas 77704  
23 jpc@obt.com

24 For the Defendant Icon, PLC:

25 MR. ELAI KATZ  
McDermott Will & Emery  
One Vanderbilt Avenue  
New York, New York 10017  
ekatz@mwe.com

MR. SCOTT L. DAVIS  
Husch Blackwell LLP  
1900 North Pearl Street, Suite 1800  
Dallas, Texas 75201  
scott.davis@huschblackwell.com

1 APPEARANCES (Continued):

2 For the Movant United States of America:

3 MR. JAMES G. GILLINGHAM  
4 United States Attorney's Office - Tyler  
5 110 North College Street, Suite 700  
6 Tyler, Texas 75702  
7 james.gillingham@usdoj.gov

8 MS. ERIN COLLERAN  
9 United States Department of Justice  
10 175 North Street Northeast  
11 Washington, D.C. 20002  
12 erin.colleran@usdoj.gov  
13  
14  
15  
16  
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1 Proceedings reported by stenotype. Transcript  
2 produced by computer-aided transcription.

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4 (The following proceedings were held in open  
5 court commencing at 2:14 p.m., reported as  
6 follows:)

7 (Call to order of the Court.)

8 THE COURT: Thank you. Please be seated.

9 Good afternoon, everyone. It's good to see  
10 some familiar faces and welcome back to Beaumont, Texas.

11 We're here today in the case of *United States*  
12 *of America, Brook Jackson, plaintiff, v. Ventavia*  
13 *Research Group, LLC; Pfizer, Inc.; and Icon, PLC* in  
14 Civil Action 1:21-cv-8. We're here on four matters:  
15 Pfizer's motion to dismiss the second amended complaint,  
16 which is Docket 119; Icon's motion to dismiss the second  
17 amended complaint, which is Docket No. 120; Ventavia's  
18 motion to dismiss the second amended complaint,  
19 Docket No. 121; and the government's motion to intervene  
20 and to dismiss, which is Docket 137.

21 Although I recognize lawyers from our  
22 previous hearings in this matter, I would like all of  
23 you to formally introduce yourselves on the record and  
24 your clients and also advise the Court if you're ready  
25 to proceed on these matters.

1 MR. FRIEDMAN: Morning, your Honor, or  
2 afternoon, your Honor. Jeremy Friedman, attorney for  
3 relator Brook Jackson.

4 THE COURT: All right. Thank you.

5 MR. MENDENHALL: Yes. Good afternoon, your  
6 Honor. Warner Mendenhall on behalf of Brook Jackson.

7 Thank you.

8 THE COURT: Thank you.

9 MR. BARNES: Good afternoon, your Honor.  
10 Robert Barnes on behalf of Brook Jackson. And, yes,  
11 your Honor, we are ready to proceed.

12 THE COURT: Very good. And Ms. Jackson is  
13 with you?

14 MR. BARNES: Yes. Yes, your Honor.

15 THE COURT: All right. Let me just remind  
16 everyone, if you would please, to -- if you're going to  
17 address the Court -- and it may be easier ultimately  
18 from the lectern -- but please speak into the  
19 microphone. I know you may think you're projecting and  
20 you may well be, but the acoustics are not that great  
21 here and -- for us, namely my court reporter, as well as  
22 myself to be able to hear you, we're going to need you  
23 to speak into the microphone.

24 Okay. And for the defendants?

25 MR. GILLINGHAM: Your Honor, actually,

1 James Gillingham on behalf of the United States.

2 THE COURT: Okay.

3 MS. COLLERAN: And Erin Colleran on behalf of  
4 the United States.

5 THE COURT: All right. Thank you.

6 MR. GILLINGHAM: And we're ready to proceed  
7 on the United States's motion to intervene and dismiss.

8 THE COURT: All right. Just give me one  
9 second, please.

10 Okay. So, of course, you come from Tyler and  
11 Washington, D.C.; is that correct?

12 MS. COLLERAN: Yes.

13 MR. GILLINGHAM: Yes, your Honor.

14 THE COURT: All right. And continuing down  
15 this row.

16 MR. WESSEL: Good afternoon, your Honor.  
17 Carl Wessel with DLA Piper on behalf of Pfizer.

18 MS. SELF: Good afternoon, your Honor.  
19 Meagan Self on behalf of Pfizer.

20 THE COURT: All right. Thank you.

21 MR. CARROLL: Your Honor, Jack Carroll,  
22 Orgain, Bell & Tucker, on behalf of Pfizer.

23 THE COURT: Thank you very much.

24 MS. MCDONALD: Your Honor, Taryn McDonald on  
25 behalf of Ventavia Research Group.

1 THE COURT: All right. Thank you very much.

2 All right.

3 MR. KATZ: Your Honor, Elai Katz, McDermott  
4 Will & Emery, on behalf of Icon, PLC.

5 MR. DAVIS: Your Honor, Scott Davis on behalf  
6 of Icon, PLC. And we are ready to proceed.

7 THE COURT: I would like to start with the  
8 government's motion to intervene and their motion to  
9 dismiss. And I would go ahead and ask Mr. Gillingham  
10 to -- I guess you'll be taking lead on this -- to  
11 proceed.

12 MR. GILLINGHAM: Thank you, your Honor.  
13 And may it please the Court?

14 THE COURT: Yes.

15 MR. GILLINGHAM: Assistant United States  
16 Attorney James Gillingham on behalf of the United  
17 States.

18 Your Honor, we're here on the United States's  
19 motion to intervene pursuant to 31 U.S.C. § 3730(c)(3)  
20 and for purposes of dismissing this case over the  
21 relator's objections pursuant 31 U.S.C. § 3730(c)(2)(A).  
22 Because the United States has good cause to intervene,  
23 it's provided the relator notice of its intent to  
24 dismiss, and as we see here, the Court is affording the  
25 relator a hearing. All statutory prerequisites to

1 intervention and dismissal have been met, and the Court  
2 should allow the United States to intervene and dismiss  
3 this case pursuant to (c)(2)(A).

4 THE COURT: Let me ask you -- well, before I  
5 ask, I will say I'm allowing a hearing on all of these  
6 motions today. Frankly, the Court could probably decide  
7 these without the benefit of a hearing. However,  
8 hearings were requested on these different motions, and  
9 I do believe in giving everyone an opportunity to be  
10 heard and to tell me what you feel like you need to tell  
11 me either for your motion or in opposition to a motion.

12 One question that is not -- about the subject  
13 of good cause, that's a phrase that's not defined in the  
14 statute you cited. I recognize there's some case  
15 authority on good cause, but I want to hear from the  
16 government what you think is good cause for intervening  
17 in this case.

18 MR. GILLINGHAM: Your Honor, the  
19 United States's position on good cause is that although  
20 it's not defined in the statute, it's been developed in  
21 the case law. And it's really, kind of, a -- it's not a  
22 burdensome concept. It's something that's a flexible  
23 standard that really just boils down to whether or not  
24 there's a legally sufficient reason. And in this case,  
25 your Honor, the legally sufficient reason is set forth



1 in the United States's motion.

2 And the good cause for intervention is -- is,  
3 kind of, a number of factors that boil down to the  
4 United States's decision here. And these are the same  
5 factors that support the motion to dismiss under  
6 (c)(2)(A). And, your Honor, as set forth in the  
7 United States's brief on Page 7, it has investigated the  
8 relator's claims in her complaint and all of her amended  
9 complaints. The FDA, as previously been discussed in  
10 the prior motion to dismiss hearing in the statement of  
11 interest, has -- it was aware of Ms. Jackson's  
12 allegations prior to the EUA and has been aware of those  
13 since issuing additional EUAs. The new information  
14 contained in the amended complaint is based on  
15 information that's in the public record that the FDA is  
16 aware of. The FDA continuously monitors the market, the  
17 incidents, the COVID results, and it's simply reached a  
18 different conclusion than the relator's conclusion here.

19 And I think that that's summarized pretty  
20 succinctly in the JAMA article that was cited in our  
21 motion where the FDA's view is that the COVID vaccine is  
22 effective and it has saved tens of millions of lives.  
23 So the United States in that aspect has decided that the  
24 likelihood of success here is small. But  
25 there's also --

1 THE COURT: Likelihood of success in terms of  
2 the relator continuing the action against the  
3 defendants, the success is low? Is that what the  
4 government thinks?

5 MR. GILLINGHAM: Your Honor, that's -- that's  
6 the government's view, especially given the FDA  
7 continuing to authorize these, monitoring the COVID  
8 vaccine data. It's our belief that the vaccine is safe.  
9 It's protected tens of millions of lives.

10 But then the second factor here, your Honor,  
11 that I think is important is that continuing this  
12 lawsuit will impose a substantial burden on the  
13 Department of Justice, the FDA, HHS, potentially even  
14 DOD in the obligation to respond to discovery, to  
15 continue to monitor this case. As your Honor is aware,  
16 this has been a litigious case. The government's  
17 already had to file a statement of interest in this  
18 case. We're seeking now to terminate our involvement to  
19 avoid these continued burdens of discovery and the  
20 potential for privileged documents to be disclosed as  
21 part of that.

22 THE COURT: Now, normally, you, the  
23 government, certainly is given an opportunity to  
24 intervene. There are times the government decides that  
25 they wish to join with a relator, help with the

1 prosecution expenses and work together against some  
2 other person who allegedly -- a person or company that  
3 has allegedly defrauded the government, correct?

4 MR. GILLINGHAM: Correct, your Honor.

5 THE COURT: There are other times the  
6 government says, well, it's an interesting case, we are  
7 not interested in investing resources in the case, but  
8 we're not opposed to the -- a relator, in what is called  
9 a qui tam action, going after someone for alleged fraud.  
10 And, of course, if successful, the government would get  
11 a recovery of money and out of that recovery pay the  
12 relator and her attorneys money for their efforts in  
13 pursuing that action, correct?

14 MR. GILLINGHAM: Your Honor, mostly correct.  
15 Although the obligation to pay attorney's fees doesn't  
16 come from the government. That would be a statutory  
17 right to recover from defendants.

18 THE COURT: All right. But the bottom  
19 line is -- that's fair. But there would be money going  
20 back to cover the litigation expenses, correct?

21 MR. GILLINGHAM: Yes, your Honor. The false  
22 claims --

23 THE COURT: So those are two scenarios that  
24 the government could have had -- could have taken  
25 advantage of in this case. The government chose neither

1 one of those two, correct?

2 MR. GILLINGHAM: The government initially  
3 declined to intervene in this case, your Honor.

4 THE COURT: All right. Now -- then the  
5 government came along and prepared a statement of  
6 interest where they essentially said they did not want  
7 this -- they didn't think this was an appropriate case.  
8 It wasn't a valid case and scientific data didn't  
9 support it -- many different things.

10 Is that a rare thing for the government to  
11 do?

12 MR. GILLINGHAM: Your Honor --

13 THE COURT: In terms of all the qui tam  
14 actions that are out there on all sorts of different  
15 actions?

16 MR. GILLINGHAM: Your Honor, I'd say -- I  
17 wouldn't say it's a rare thing for the government to  
18 take a position -- a statement of interest on a variety  
19 of issues, but I wouldn't say it's also the most common  
20 thing.

21 THE COURT: Okay.

22 MR. GILLINGHAM: I think it's really a  
23 case-by-case basis depending how the issues present.

24 THE COURT: All right. So that's a third  
25 option and that was done early -- well, not early on,

1 but some time ago in this case. And now there's a  
2 fourth option, which we have, which is your motion to  
3 intervene, correct?

4 MR. GILLINGHAM: Correct, your Honor.

5 THE COURT: And, ultimately, a motion to  
6 dismiss. How often do you do that?

7 MR. GILLINGHAM: Your Honor, the --

8 THE COURT: In qui tam cases?

9 MR. GILLINGHAM: The option of intervening  
10 for the purpose of dismissing is probably the least  
11 common of those -- those scenarios, your Honor.

12 THE COURT: All right. And even though the  
13 government could stand to benefit financially in the  
14 event Ms. Jackson and her team were successful against  
15 these defendants; is that correct?

16 MR. GILLINGHAM: Yes, your Honor.

17 THE COURT: All right. I didn't mean to  
18 interfere with your argument, but go right ahead with  
19 your comments.

20 MR. GILLINGHAM: No need to apologize, your  
21 Honor.

22 But to follow up on the last point, I think  
23 that it's worth a little bit of additional discussion.  
24 The mere fact that the government could recover  
25 something down the road even -- even if it's projected

1 to be billions of dollars does not outride -- does not  
2 outweigh the government's analysis of whether or not to  
3 proceed here. And the Supreme Court considered that  
4 exact argument in the *Polansky* case, your Honor.

5 In the *Polansky* case, the defendant -- the  
6 relator's position in opposing the government's motion  
7 to intervene for purposes of dismissing was that it was  
8 a strong case and the government was leaving billions of  
9 dollars on the table for what it characterized as merely  
10 a months' worth of time doing some discovery. And the  
11 Supreme Court said there it's not the relator's position  
12 to make that, you know -- that cost benefit analysis.  
13 The government always has the primary interest. We're  
14 the real party in interest, and the qui tam purposes of  
15 the False Claims Act are to vindicate the government's  
16 interests.

17 But for the reasons set forth in our brief  
18 and what we've already articulated here, the  
19 difference -- the different view of this COVID vaccine  
20 by the FDA and the imposition of burdens on the  
21 government to continue this litigation, those have  
22 almost been uniformly held to support good cause for  
23 intervention and dismissal. And that's what happened in  
24 *Polansky* and that's what should happen today, your  
25 Honor.

1 THE COURT: Now, was good cause actually  
2 defined in the *Polansky* case?

3 MR. GILLINGHAM: No, your Honor. In  
4 *Polansky*, the Court, again, looked to -- I think it  
5 discussed the Third Circuit's language regarding it  
6 being a flexible capacious concept that's really a low  
7 bar. And I think that's -- that's the most important  
8 part of this, is that --

9 THE COURT: But there are other cases that  
10 discuss -- not this particular Supreme Court case -- but  
11 there are other cases that define -- that put parameters  
12 around what is good cause for the government to  
13 intervene. And you have essentially summarized some of  
14 those points here in this hearing.

15 Is there anything else you wanted to add  
16 about good cause?

17 MR. GILLINGHAM: No, your Honor. I think  
18 that the biggest takeaway from my perspective and the  
19 United States's perspective on good cause is that it's a  
20 low bar. And I think that *Polansky* cautioned that a  
21 Court should think, not just once, not twice, but many  
22 times before denying the opportunity for the government  
23 to intervene for purposes of dismissal.

24 THE COURT: Now, the *Polansky* case was  
25 decided eight justices to one, and Justice Thomas wrote

1 a dissent in that case.

2 Why do you think *Polansky* applies in this  
3 case and why isn't Justice Thomas's dissent worthy of  
4 consideration by this Court?

5 MR. GILLINGHAM: Your Honor, a few points. I  
6 think *Polansky* applies because it fairly well tracks the  
7 situation here where the government offered concerns  
8 about the viability of the case balanced against the  
9 imposition on the government of continuing to monitor  
10 the case and get involved in discovery. And the Court  
11 agreed that the government's decisions that -- analysis  
12 was a rational reason for it to step in and dismiss.  
13 That tracks exactly what the government is doing here,  
14 your Honor.

15 And in both cases, the relator argued that  
16 there was billions of dollars on the table and it was a  
17 strong case; but the Court still affirmed the dismissal.  
18 Now, Justice Thomas's involvement in False Claims Act  
19 cases is interesting. Justice Thomas, I think, has an  
20 issue with the False Claims Acts relator -- relator  
21 provisions altogether. And so I think that there's a  
22 reason that he was the outlier in that case. And I -- I  
23 don't think there is anything about Thomas's dissent in  
24 that case -- in the *Polansky* opinion that guides this  
25 Court's analysis here.



1 And as the Court's aware, that -- his dissent  
2 doesn't have any precedential value and what the Court  
3 should do is recognize that *Polansky* said that we could  
4 intervene at any time. And, in fact, we're doing it  
5 much earlier in this case than *Polansky*, which was much  
6 further into discovery at that point. And that once we  
7 do intervene for good cause, that the -- the Court  
8 settled the debate on what the standard was for  
9 dismissing the case.

10 THE COURT: I think the *Polansky* case said  
11 that the intervention could come some time during the  
12 litigation. So even though this case has been on for  
13 several years -- of course, there's been a lot of  
14 procedural issues that have made it last that long -- I  
15 think it's probably the oldest case on my docket since  
16 most of my cases are concluded within about -- or,  
17 actually, less than 12 to 18 months. But be that as it  
18 may, it is what it is. And here we are.

19 The timing of your intervention is not really  
20 an issue?

21 MR. GILLINGHAM: No, your Honor.

22 THE COURT: All right. Now, the -- the  
23 *Polansky* decision did affirm a dismissal of the case  
24 under Federal Rule of Civil Procedure 41(a), which is a  
25 rule that allows a plaintiff to basically dismiss a case

1 if there hasn't been an answer on file by the  
2 defendants. For whatever reason, they decide we don't  
3 want to pursue it anymore or we've gotten into it and we  
4 don't feel comfortable pursuing it. Maybe they settled  
5 it. Who knows? There's just some reason. And those  
6 types of dismissals are routinely granted by courts,  
7 correct?

8 MR. GILLINGHAM: Your Honor, I would agree  
9 with most of that. I think that under 41(a)(1)(A),  
10 there is no adjudicatory function of the Court. It's  
11 done by a notice and it's self-effectuating in a sense,  
12 but --

13 THE COURT: It really is, isn't it?

14 MR. GILLINGHAM: Yes. But, yes, your Honor.  
15 They're very common. They may be done for a variety of  
16 reasons. But, again, I think that the Court's -- the  
17 Court did recognize that Rule 41 provides the proper  
18 standard. And as we know, 41, the standard would depend  
19 on where we are in the litigation.

20 THE COURT: And in this case -- the  
21 defendants in this case have simply filed motions to  
22 dismiss, not a motion for summary judgment, which if  
23 they had done that, Rule 41(a) dismissal -- voluntary  
24 dismissals would not be appropriate, correct?

25 MR. GILLINGHAM: We would be under 41(a)(2),

1 your Honor, yes.

2 THE COURT: All right. So they haven't  
3 answered. They have filed a motion to dismiss. Does  
4 that then allow -- there is nothing in that rule -- that  
5 would apply here that would prohibit a dismissal just  
6 because they filed a motion to dismiss; is that correct?

7 MR. GILLINGHAM: Your Honor, I'm not aware of  
8 anything. Given that there has been no answer and no  
9 motion for summary judgment, I think we're squarely  
10 within the ambit of 41(a)(1)(A).

11 THE COURT: Okay. All right. Continue with  
12 your evaluation of the case.

13 MR. GILLINGHAM: And, your Honor, since we're  
14 on the topic of 41(a)(1)(A), again, similar to the good  
15 cause burden, this is extremely a low burden. You know,  
16 41(a)(1)(A) is a non-adjudicatory function that's done  
17 on a notice. However, it is subject to other applicable  
18 rules. Therefore, in this context, although 41(a)(1)(A)  
19 applies, we still have to look to the False Claims Act  
20 under (c)(2)(A), which does require notice to the  
21 relator and the opportunity for a hearing.

22 And so -- so that's why we're here today,  
23 your Honor. Those two aspects, the notice and hearing,  
24 aren't inherent in 41, but the catchall 41 does say we  
25 have to make sure that we comply with other applicable

1 statutes.

2 THE COURT: And the relator in this case  
3 takes issue with your position and the government's  
4 position that you have good cause?

5 MR. GILLINGHAM: Yes, your Honor.

6 THE COURT: All right.

7 MR. GILLINGHAM: And I think that the -- the  
8 reality is there's a very strong difference of opinion  
9 on the ultimate issues relating to the COVID vaccine and  
10 that's a big fight. But it doesn't change the fact that  
11 the reasons the government has provided to dismiss and  
12 for intervention that the -- you know, that the agency's  
13 aware of this, that it's continuing to prove the EUAs,  
14 that it's aware of all the data that Ms. Jackson's  
15 complaint -- amended complaint is based on, and that  
16 we're trying to avoid the burdens of continued  
17 litigation. That -- those factors have been routinely  
18 upheld here.

19 So the government -- the United States in  
20 this case believes that it does have good cause for  
21 those reasons and also satisfies all -- once  
22 intervention has taken place, satisfies all of the  
23 requirements under 41(a)(1)(A). I don't believe that  
24 the issue of notice is really at issue today. I think  
25 that's checked off. And the hearing being provided

1 today satisfies the other element. So at this point,  
2 the government has satisfied all statutory requirements  
3 and complied with the *Polansky* decision and the Court  
4 should allow it to interview and effectuate a dismissal  
5 pursuant to (c)(2)(A).

6 THE COURT: All right. Anything else?

7 MR. GILLINGHAM: Your Honor, just a couple of  
8 points, I think, on some issues that will likely be the  
9 topic of the relator's presentation.

10 The United States's view of what's required  
11 by the hearing for purposes of satisfying (c)(2)(A) is  
12 merely what we're doing right here, is this hearing.  
13 There is no requirement for an evidentiary hearing.  
14 There's nothing in the rule that requires an evidentiary  
15 hearing. That would be inconsistent with the 41(a)(1)  
16 standard that -- as we've discussed. A notice -- the  
17 Court doesn't have an adjudicatory function.

18 And so we believe that there's no need for an  
19 evidentiary hearing in this case. And the courts  
20 generally have in the (c)(2)(A) context when addressing  
21 this evidentiary -- the question of an evidentiary  
22 hearing has almost uniformly said no evidentiary hearing  
23 because the point of today is not to have a mini trial  
24 on the merits of the underlying case. This is the --  
25 the point of the hearing today is for the relator to

1 have an opportunity to be heard, for the United States  
2 to put forth its reasons for dismissal, and for the  
3 Court to ensure that there is no, maybe, constitutional  
4 issues with -- with the dismissal.

5 And the constitutional issues we don't  
6 believe are present in this case, your Honor. The  
7 fourth footnote in the *Polansky* decision does reference  
8 the possibility that -- in trying to determine what's  
9 required by a hearing, when the underlying rule that has  
10 been adopted allows dismissal upon notice, the Court  
11 posited that it may be for purposes of the Court to  
12 confirm that there's no constitutional harm to the  
13 relator affected by this dismissal. And it identifies  
14 equal protection and due process as potential issues. I  
15 don't think that anyone has raised an equal protection  
16 challenge to the United States's dismissal here. And  
17 the United States believes it has complied with all due  
18 process requirements pursuant --

19 THE COURT: Does Rule 24 impact the  
20 government's right to intervene and the ability to show  
21 good cause as relator argues?

22 MR. GILLINGHAM: No, your Honor. The Rule 24  
23 analysis is really separate and apart from the  
24 intervention and the False Claims Act. The False Claims  
25 Act provides its own basis for intervention by the

1 government in these situations. Rule 25 is a more  
2 general rule --

3 THE COURT: Twenty-four, you mean?

4 MR. GILLINGHAM: So sorry. Yes, your Honor.  
5 Rule 24 is the general rule for intervention in general  
6 civil litigation. This is a more -- the False Claims  
7 Act has its own specific rules that apply to the  
8 United States seeking to intervene. And that's --  
9 that's why we're moving under 3730(c)(3) and (c)(2)(A).  
10 And, your Honor, for instance, in the *Polansky* decision  
11 when the Court was determining what the standard for  
12 intervention -- whether or not it was allowed in the  
13 standards -- it never looked to Rule 24. And the Court  
14 imposed the burdens under Rule 3730(c)(3). So the  
15 United States's view is that 24 -- although a general  
16 rule on intervention -- doesn't apply here.

17 THE COURT: With regard to evidentiary  
18 hearings, I understand it, among other things -- you  
19 talked about cause -- you did make some statements that  
20 the government felt that the vaccine was effective.  
21 Some people disagree with that. Some people think it's  
22 even harmful. But -- and I state that just having read  
23 a newspaper or two over the last few years. But the  
24 real issue here is that Ms. Jackson claims that she saw  
25 some variations in the testing protocol when they were

1 testing that -- you know, maybe they didn't -- they may  
2 have given the vaccine to someone when they were testing  
3 it, but they didn't wait the full allotted time watching  
4 the person to see if they had a reaction or they  
5 didn't -- when they injected it in the test people, that  
6 they didn't necessarily have it at the right temperature  
7 or things of those nature. Those are factual claims  
8 that she's making.

9           Your position on this evidentiary situation  
10 is that given the procedural nature of the case, with  
11 your motion to intervene and your motion to dismiss,  
12 the -- an evidentiary hearing on the ripeness of her  
13 claim is not really what we do here. It's simply the  
14 government, in this instance, has evaluated her claims  
15 and determined in the government's view that her claims  
16 are not worthy of pursuing in a court of law. And for  
17 that reason, it's the government's claim -- because it  
18 was the government that was purportedly defrauded by  
19 these defendants over here -- and you all don't want to  
20 pursue that, and you have the right under the statute to  
21 intervene and dismiss the case.

22           Have I basically summed up what you're saying  
23 on the evidentiary hearing aspect of this?

24           MR. GILLINGHAM: Absolutely, your Honor.  
25 These are -- the United States is always the real party



1 in interest. The case law makes very clear that our  
2 interests are always predominant. And as *Polansky* said,  
3 if the government offers a reasonable argument that the  
4 burdens of continued litigation outweigh the benefits,  
5 the Court should grant the motion.

6 THE COURT: Okay.

7 MR. GILLINGHAM: That's exactly our position,  
8 your Honor. So for those reasons, and then the fact  
9 that there's no requirement for an evidentiary hearing  
10 in the statute, it'd be consistent with Rule 41(a)(1)(A)  
11 and, frankly, the legislative history of the False  
12 Claims Act. We don't believe an evidentiary hearing is  
13 required. We think the hearing requirement probably  
14 could have been satisfied on the papers, but it is  
15 definitely satisfied here today.

16 And I think the -- the final issue, your  
17 Honor, is just to touch on -- go back to these  
18 constitutional concerns. Again, no equal protection  
19 violation, procedural due process. I think that the  
20 notice, the briefing, this hearing satisfy all of that.  
21 And there's no substantive due process concern because  
22 the decision the government's making is not arbitrary in  
23 a constitutional sense. We have offered a well-reasoned  
24 opinion -- a reasoned basis for our decision. It's not  
25 arbitrary in the constitutional sense; and, therefore,

1 there's not going to be any due process issues.

2 THE COURT: Okay. Anything further?

3 MR. GILLINGHAM: No, your Honor. If your  
4 Honor has any further questions, I'm happy to address  
5 them. But, otherwise, we'd sit down. -

6 THE COURT: I'm sure you probably feel like  
7 you've had enough questions from me already.

8 MR. GILLINGHAM: Your Honor, I'm always happy  
9 to assist the Court in any way I can.

10 THE COURT: If I think of another one, I'll  
11 let you know.

12 MR. GILLINGHAM: Thank you, your Honor.

13 THE COURT: All right. Okay. Now, did  
14 you -- I was going to let Mr. Barnes respond to the  
15 government's motion. But do you want to --

16 MR. WESSEL: If I might, your Honor, just a  
17 few points that I would add to the government's motion.  
18 It might make sense logically to hit those now.  
19 Obviously --

20 THE COURT: Well, I guess I might as well let  
21 the defendants -- let their load -- unload on you, and  
22 then you can respond to all of it when -- when I give  
23 you a chance, okay?

24 Yes, sir. Go right ahead.

25 MR. WESSEL: Thank you, your Honor. Good to

1 see you again. Carl Wessel on behalf of Pfizer.  
2 Pfizer's position is that its motion to dismiss under  
3 12(b)(6), 12(b)(1) is really mooted in light of the  
4 government's motion.

5 THE COURT: Well, that was going to be one of  
6 the first questions.

7 MR. WESSEL: Yes.

8 THE COURT: Now, if I deny the government's  
9 motion, then I will need to make an opinion -- a  
10 decision on all of your motions to dismiss. If I grant  
11 the government's motion, then all of your motions to  
12 dismiss will be essentially moot because --

13 MR. WESSEL: Essentially. And I can parse  
14 through that. There's a little subtlety there because  
15 of the retaliation claim.

16 THE COURT: I was going to ask you about  
17 retaliation because that's the one thing that -- the  
18 government cannot dispense with her claim for  
19 retaliation -- she was fired, as I recall the facts,  
20 like a day or two after this event. I may be off a  
21 little bit on my facts -- but shortly after. Maybe even  
22 that day. I don't remember exactly. But that -- you  
23 don't -- you're not moving to dismiss that, are you?

24 MR. WESSEL: Yeah. I believe, your Honor --  
25 and obviously that's a claim against Ventavia. Pfizer

1 is not named in that claim.

2 THE COURT: Right.

3 MR. WESSEL: But -- I will -- you know, just  
4 to assist the Court, you know, our sense is that claim  
5 will remain, that cannot be dismissed by the  
6 government's motion --

7 THE COURT: Regardless of what happens with  
8 the government's motion or with all of your motions?

9 MR. WESSEL: That's correct.

10 THE COURT: Okay.

11 MR. WESSEL: That's correct. And maybe just  
12 to run through briefly, your Honor, if it's helpful. So  
13 Counts One through Four, these are the False Claims Act,  
14 the qui tam claims, right? And they're against Pfizer,  
15 Icon, and Ventavia. These would be gone if you grant  
16 the government's motion. So those go. And that ends  
17 all of the claims against Pfizer and Icon, so, again,  
18 unnecessary to address our 12(b)(6), 12(b)(1) motion.

19 THE COURT: Well -- now, hold on. I'm going  
20 to have the relator respond to the motion to dismiss,  
21 and then I'm going to go ahead and have a hearing on  
22 y'all's motions to dismiss since you're all here. I  
23 wouldn't want to have everybody come back, if necessary,  
24 for another time. I mean, it's expensive for everybody  
25 to fly here and all of that. I want to go ahead and get

1 that portion of the hearing done. Whether or not we  
2 ultimately decide -- need to decide on that, we'll see.

3 MR. WESSEL: Yes. That's certainly fine. If  
4 the Court wishes to proceed that way, that's fine with  
5 Pfizer. I don't think there -- as you know, we spent a  
6 lot of time discussing the issues there, the *Harman*  
7 case, et cetera back in March. Those are essentially  
8 the same issues. We can talk a little bit about that.

9 THE COURT: Yeah.

10 MR. WESSEL: But just to, kind of, finish it  
11 out, I do think that if -- if you grant the government's  
12 motion, all of that is moot. The Counts Five and Six,  
13 those retaliation claims, you know, which are brought  
14 under the False Claims Act in state law, they would  
15 apply to relator's former employer Ventavia. And,  
16 obviously, I'm going to let their counsel address those  
17 because -- those are still live and, you know, probably  
18 could benefit from argument.

19 THE COURT: Sure.

20 MR. WESSEL: But if I might, your Honor, just  
21 a couple of points on the government's motion because I  
22 just think it's important to -- you know, that that's  
23 obviously an essential piece of the litigation here.  
24 And I think -- I mentioned the *Harman* case, and you and  
25 I discussed that at length back -- I guess it was a

1 little more than a year ago. And that obviously -- the  
2 essential issue in there is that materiality issue, but  
3 there are other issues in there that I think are -- are  
4 quite significant to this litigation.

5           So if I might just -- you know, if you, kind  
6 of, boil down the relator's objections to the  
7 government's motion and, sort of, put aside the  
8 inflammatory rhetoric and things of that nature, it's  
9 really a disagreement about, you know, the safety and  
10 efficacy of the vaccine. The FDA has a position that  
11 the vaccine is safe and effective and saves lives, and  
12 the relator obviously strongly disagrees with that. But  
13 that's not really relevant to the motion, right? We  
14 talked, and the government spoke -- spoke very well  
15 about what the law is, and that's the essential issue  
16 here.

17           But the -- and the reason why I raised that  
18 *Harman* case is the Fifth Circuit -- so, obviously, you  
19 have the *Polansky* precedent, which was discussed, I  
20 think, very effectively there. But -- but in the *Harman*  
21 case, the Fifth Circuit also addresses a very, very  
22 similar issue. When they went through, sort of, a  
23 survey of the case law, they quote from a First Circuit  
24 case called *D'Agostino*, very approvingly in that case,  
25 and that case was postured in a similar way. And in

1 that case, this is what -- the *Harman* -- the  
2 Fifth Circuit said about the First Circuit. It talked  
3 about the First Circuit affirming a dismissal in that  
4 case under 12(b)(6). And what the -- the *D'Agostino*  
5 court, the First Circuit said is: The fact that the  
6 Centers for Medicare/Medicaid Services have not denied  
7 reimbursement -- and this was a device case, not a  
8 vaccine.

9 THE COURT: Okay.

10 MR. WESSEL: But, obviously, a lot of  
11 similarities --

12 THE COURT: And it's a 12(b)(6) case --

13 MR. WESSEL: Yes. Both 12(b)(6). But, I  
14 think -- again, what it, kind of, circles back on is  
15 this whole disagreement between the relator and the  
16 government, which I think the Fifth Circuit is, sort of,  
17 warning against.

18 THE COURT: Okay.

19 MR. WESSEL: So what the First Circuit said  
20 is: The fact that the Centers for Medicare and Medicaid  
21 Services have not denied reimbursement for the device in  
22 the wake of the relator's allegations casts serious  
23 doubt on the materiality of the fraudulent  
24 representations that the relator alleges. This is this  
25 whole materiality issue we talked about at length. Then

1 the Court goes on to say: Allowing the False Claims Act  
2 claim to go forward -- and now here it's quoting from  
3 the First Circuit -- would be to turn the False Claims  
4 Act into a tool with which a jury of six people could  
5 retroactively eliminate the value of FDA approval and  
6 effectively require that a product be withdrawn from the  
7 market even when the FDA itself sees no reason to do so.

8 And, basically, what the Fifth Circuit says  
9 is these cautions remain forceful on the materiality  
10 context -- in the materiality context. The False Claims  
11 Act exists to protect the government from paying  
12 fraudulent claims, not to second guess agencies'  
13 judgments about whether to rescind regulatory rulings.  
14 So -- so I think in a lot of ways, even though the  
15 *Harman* case really addresses materiality at various  
16 stages in the litigation -- and we talked at length  
17 about this, your Honor. I don't want to go --

18 THE COURT: I see how you're connecting --

19 MR. WESSEL: Yes. Yes. Exactly. And you'll  
20 recall, you know, the conclusion of the *Harman* case,  
21 what the Fifth Circuit said is: For the demands of  
22 materiality, adjust the tensions between the singular  
23 private interest and those of the government and cabin  
24 the greed that fuels it. As the interests of the  
25 government and the relator diverge, this congressionally



1 created enlistment of private enforcement -- that's the  
2 False Claims Act -- is increasingly ill served when the  
3 government, at appropriate levels, repeatedly concludes  
4 it has not been defrauded, it is not forgiving a fraud,  
5 rather it's concluding that there was no fraud at all.

6 THE COURT: So as a general principal, under  
7 Fifth Circuit authority that I'm duty bound to follow,  
8 as well what you're saying is Supreme Court authority,  
9 which I'm obligated to follow, even if a lot of people  
10 might disagree with the decision to prove -- to approve  
11 a medical device or the decision to evaluate the testing  
12 protocols of a vaccine and -- that later determined that  
13 whatever variations there were, were not material to the  
14 ultimate decision to approve the drug, which is really  
15 the gist of the fraud claim.

16 You know, that's to say these defendants,  
17 your client, kind of tricked the FDA into approving this  
18 because they didn't use proper test protocols. I know  
19 the government denies that. They say it's not true.  
20 But that decision to say, no, we're satisfied with the  
21 government's decision -- we're satisfied with the test  
22 protocols and -- that -- a lot of people may disagree  
23 with that decision. But these cases are saying if  
24 that's what the agency has decided and if the government  
25 has decided they don't want to pursue this for the

1 reasons he described, they can have a case dismissed.

2 MR. WESSEL: That's correct, your Honor.

3 That's what the Fifth Circuit said relying, again, on  
4 First Circuit precedent. And effectively getting to the  
5 government's motion, that's what *Polansky* -- you know, I  
6 know there are separate issues of materiality in the  
7 government's motion to dismiss.

8 THE COURT: Right.

9 MR. WESSEL: But really -- really those two  
10 precedents are binding on the Court.

11 THE COURT: Okay. That's interesting. I  
12 hadn't really -- in coming out here today, I hadn't  
13 really -- I remembered your arguments on materiality,  
14 but I didn't really -- I wasn't focused on those. It's  
15 probably good to --

16 MR. WESSEL: It was some time ago,  
17 your Honor, and I think we were here for hours. So I  
18 had to go back and refresh myself.

19 One other quick point on our motion to  
20 dismiss because I know you -- you wanted to, you know,  
21 hear that in case --

22 THE COURT: Well, I wanted to hear the motion  
23 to dismiss after --

24 MR. WESSEL: That's fine. I'll save that and  
25 just --

1 THE COURT: I think it would be cleaner.

2 MR. WESSEL: No problem. Happy to do that.  
3 You know, just a couple of points on -- on -- just to  
4 highlight some of the things --

5 THE COURT: And the reason I want to do it --  
6 still have it is I want to hear arguments on the  
7 government's motion to dismiss. And I'm going to  
8 consider that separate and apart from the defendants'  
9 motions to dismiss. If, obviously, I agree with the  
10 relator, then I need to then consider what the arguments  
11 are on the motions to dismiss. And I don't want to have  
12 to have everybody come back again if -- in that  
13 eventuality to hear -- to have y'all do it. I want to  
14 have it one-stop shop and get it all done today.

15 But by the same token, if -- even though you  
16 will have argued the motions to dismiss, should the  
17 ultimate evaluation of this Court be that the  
18 government's motion to intervene and motion to dismiss  
19 is valid, then I think the motions to dismiss will  
20 simply be -- the claims will be dismissed as -- granted  
21 as moot or actually, I guess, denied as moot because it  
22 really -- and you will have argued it, but so what? You  
23 know, you're prepared to do it.

24 MR. WESSEL: We agree with that, your Honor,  
25 and that seems like a sensible way to proceed to me.

1 THE COURT: Okay. All right. Anything else?

2 MR. WESSEL: Just maybe a couple quick points  
3 and just staying with the government's motion because  
4 then we can --

5 THE COURT: That's what I want. That's what  
6 I want.

7 MR. WESSEL: -- get into some of the others  
8 the next time around.

9 You know -- so I think there are a couple of  
10 key points there. And, obviously, I defer to the  
11 government who has far superior knowledge of this area.  
12 But since the Supreme Court clarified the law in  
13 *Polansky*, I have not seen any case law where a District  
14 Court declined to dismiss after the government filed  
15 such a motion as they have here. Also, again, since  
16 *Polansky*, I have not seen any District Court hold an  
17 evidentiary hearing. So we talked about whether that  
18 was necessary. So I think those points are worth -- are  
19 worth considering.

20 And as your Honor has pointed out, if you  
21 grant the motion, the case -- the case is done  
22 essentially. Again, there's that subtlety around the  
23 claims against Ventavia, but --

24 THE COURT: You talked about you didn't find  
25 any cases where the government moved to dismiss. Let me

1 just ask you: In qui tam cases -- and considering  
2 Rule 24 -- did you find --

3 MR. WESSEL: After -- after the *Polansky*  
4 decision, the Supreme Court's decision last year?

5 THE COURT: Well, I'm talking about any  
6 before or after *Polansky*.

7 MR. WESSEL: Yeah. No. No.

8 THE COURT: You know, Courts look to Rule 24  
9 to determine what is good cause. Did you find any cases  
10 in qui tam cases where you found that the government  
11 didn't have good cause to intervene?

12 MR. WESSEL: I think I'd defer to the  
13 government because they're probably the experts on that  
14 particular question.

15 THE COURT: Okay.

16 MR. WESSEL: But I'm not aware of any off the  
17 top of my head.

18 THE COURT: And I'm going to ask that  
19 question to relator here in a minute because I'm curious  
20 about that. Maybe there is a case out there. I want to  
21 know about it.

22 MR. WESSEL: Yes. We can look at that.

23 Again, quickly -- your Honor, again, this  
24 case would be gone if you grant the government's motion  
25 to dismiss.

1 THE COURT: Right.

2 MR. WESSEL: And it's not only our position.  
3 And all of the defendants would agree with that, and  
4 obviously that's the government's position. But when we  
5 argued back in March, that was the exact same position  
6 that Mr. Mendenhall took with the Court. And, again,  
7 I'm quoting from the transcript back then, Page 108,  
8 where Mr. Mendenhall told the Court, "I think that,  
9 first of all, if the U.S. government, if it wants this  
10 case dismissed, it can come here and dismiss this case."  
11 And then on the next page, 109, Mr. Mendenhall says  
12 again, "And if the government wants this case gone, why,  
13 they can come in tomorrow and get it gone, your Honor."  
14 So --

15 THE COURT: And that was before the *Polansky*  
16 decision came out, which I think was in December.

17 MR. WESSEL: Yeah. This was in March, your  
18 Honor. Yes, that's correct. Correct.

19 THE COURT: Okay.

20 MR. WESSEL: But that's all I have, your  
21 Honor. We obviously would support the government's  
22 motion to intervene and dismiss.

23 THE COURT: All right. Thank you very much.

24 Does anybody else care to comment? All  
25 right. You're saving your bullets for later then, huh?

1 MR. DAVIS: On the government's motion,  
2 Judge?

3 THE COURT: Yes. On the government's motion.

4 MR. DAVIS: No. We'll wait until we address  
5 our own.

6 THE COURT: I'll give you a chance.

7 All right. Mr. Barnes, I assume -- are you  
8 going to be the lead-off hitter for the relator?

9 MR. BARNES: I will be just addressing  
10 Counts Five and Six, the retaliation counts, your Honor.

11 THE COURT: Okay.

12 MR. BARNES: So I'll wait for that.  
13 Mr. Mendenhall will be addressing Counts One  
14 through Four.

15 THE COURT: All right. Very good.

16 MR. MENDENHALL: Your Honor, I'm actually  
17 trying to get an answer to your last question. There --  
18 it does appear that there is one case. It's *U.S. ex*  
19 *rel. Odum v. Southeast Eye Specialists*. That was in  
20 February 24th, 2021.

21 THE COURT: Do you have a cite on that one?

22 MR. MENDENHALL: I'm sorry?

23 THE COURT: Do you have a cite?

24 MR. MENDENHALL: I'll give you the case.  
25 It's Case No. 3:17-cv-689, Middle District of Tennessee.

1 THE COURT: Okay. Did you get that?

2 MR. MENDENHALL: Yeah. I'm sorry. I don't  
3 know --

4 THE COURT: You don't know if it was  
5 published or not?

6 MR. MENDENHALL: I don't know.

7 THE COURT: Okay. Well, that's pretty good.

8 MR. MENDENHALL: Well, I knew I had it  
9 because we have had this discussion in the office and it  
10 was in our chat.

11 THE COURT: Okay. That's good. So y'all --  
12 great minds think alike then.

13 What year was that?

14 MR. MENDENHALL: It was February 24th, 2021.  
15 I'm sorry I don't have more than that, but that's -- I  
16 knew we had it somewhere.

17 THE COURT: We'll run our traps and find it.

18 MR. MENDENHALL: Your Honor, obviously there  
19 is a lot to address here. And we're in a very  
20 interesting -- I'm sorry.

21 THE COURT: No. I hear you.

22 MR. MENDENHALL: We're at a very interesting  
23 stage. And one of the things that I did, which is  
24 reflected in the brief, is we went back to the Senate  
25 reports and the House reports on the Federal False



1 Claims Act. And, you know, one of the things that  
2 the -- there is a role that the relator plays,  
3 particularly when there's this effort to dismiss a case,  
4 and they say it. They say the relator is a check on the  
5 government. You know, and who's really sovereign here  
6 are the peoples. I think that's the Senate reminding us  
7 of that; that the relator is a check on the government.  
8 And the other thing is -- I think good cause is being  
9 brushed off as almost nothing.

10 THE COURT: It could really be a detriment to  
11 the attorneys in qui tam litigation since the government  
12 could intervene at any phase in a litigation after some  
13 attorneys have invested significant sums of money  
14 developing a case and have it evaporate on them late in  
15 the litigation. That could be a hard pill to swallow.

16 MR. MENDENHALL: Your Honor, I can tell you  
17 how hard it is to swallow. And I have it on appeal. In  
18 fact, they cited to one of my cases. I will say -- and  
19 that's the *Wolf Creek* case. But I will say this about  
20 the judge's opinion in *Wolf Creek*, which I thoroughly  
21 disagree with there. The judge, at least, said, look,  
22 there was an issue with the reliability and trustfulness  
23 of the relator. He said there were significant  
24 discovery issues in that case that were being considered  
25 with NASA. That's a NASA case.

1           So, at least, the judge in that case --  
2 although I fully disagree and it's on appeal and briefed  
3 at the Sixth Circuit Court of Appeals.

4           THE COURT: Okay.

5           MR. MENDENHALL: He listed the issues. He  
6 looked for reasons -- good cause reasons. It wasn't  
7 just that, oh, the government came in and wanted to  
8 dismiss. It was -- there were very specific reasons for  
9 dismissal. And if you look down at all the cases that  
10 are cited -- and we did. And I don't think we cited  
11 *Harman* in our brief opposing the U.S. government's  
12 motion to dismiss. But if you look down in all of those  
13 cases, there are real issues. In *Polansky*, for example,  
14 what happened is they had set up a discovery schedule.  
15 They were deep into discovery. And the judge actually  
16 intervened to limit the discovery, to cabinet. They set  
17 up a plan. They had very particular data requirements  
18 and controls.

19           And guess what? The relator and their  
20 lawyers, I guess, in that case completely ignored the  
21 directions of the judge and the agreements that they had  
22 met with the U.S. government to limit discovery and make  
23 sure that it was not a burden on the U.S. government,  
24 that discovery. The other thing the relator did in that  
25 case was had 14,000 pages that the relator had not

1 turned over in the discovery, which came late and  
2 completely upended the Court's schedule and everything  
3 that had been planned along with the U.S. government and  
4 the defendant. So *Polansky* has a very interesting  
5 history.

6 One other thing I want the Court to be aware  
7 of in that history in *Polansky*, the judge both  
8 considered the government's motion to dismiss, but also  
9 went on to rule on the defendant's motion to dismiss.  
10 So it was not an either-or proposition. The judge did  
11 not moot out the defendant's -- the defendant's  
12 positions and, in fact, ruled on those motions to  
13 dismiss. The Court felt that that would be very helpful  
14 in that case. And I think that -- you know, I just want  
15 the Court to be aware that that case has some very  
16 particular facts.

17 You know, the *Carver* case is another one  
18 that's interesting. And what happened in *Carver* -- the  
19 relator got a default judgment against the defendant,  
20 and then the Court, you know, apparently notified the  
21 relator that they hadn't finalized the judgment. And  
22 then the U.S. government and the relator were in a  
23 negotiation over what that judgment would consist of,  
24 what was within the scope of the False Claims Act, and  
25 what was actually in the scope of a criminal case that

1 was going in parallel. Had the relator, again, worked  
2 with the government, they would have had a default  
3 judgment entry and had an award. Instead, that relator  
4 behaved in such a way that that relator was  
5 noncooperative with the federal government and was  
6 disrupting the federal government's ability to collect  
7 against the defendants.

8           So every case we've looked at where there is  
9 a dismissal, we see things that, yeah, you know,  
10 arguably -- even in *Wolf Creek* arguably -- are good  
11 cause. And -- but good cause is not no cause. It's not  
12 that, oh, the federal government wants to come in and  
13 dismiss. That's not appropriate. That eliminates the  
14 relator's role as a check, as the Senate sought. That  
15 eliminates the Court's role to adjudicate what is or is  
16 not good cause in this case. Those are the concerns  
17 that we bring up.

18           Now, the other thing that I think is  
19 critical -- you know, there's actually a lot that I  
20 agree with in terms of the government's motion. And  
21 I'll try to get into some of that, but what we're facing  
22 right now is the decision that was made by the EPA based  
23 on what we contend are lies. That's the problem. It's  
24 not about safety --

25           THE COURT: Excuse me. The EPA?

1 MR. MENDENHALL: The FDA. Did I say EPA?

2 I'm sorry, your Honor.

3 THE COURT: That's what I thought you said,  
4 yeah.

5 MR. MENDENHALL: Too many agencies that we're  
6 suing, I guess. But the FDA -- we considered that what  
7 was said to the FDA, and we've alleged, that they are  
8 lies. Everything that they talk about in the JAMA  
9 article, in their brief is based on the lies that we're  
10 contesting. Clinical trials that put false data before  
11 the decision-makers. Clinical trials that did not  
12 reflect the all-cause mortality -- the reality of  
13 all-cause mortality. Clinical trials that were designed  
14 to obscure and call people unvaccinated even after they  
15 had had one or two shots. They were unvaccinated until  
16 after it got 14 days or whatever past the second shot.

17 So that's the way this was designed. So the  
18 data is completely flawed by clinical trial design. Our  
19 regulators made a decision based on that, and they're in  
20 here defending saying they saved millions of lives for a  
21 product that we know -- and I have submitted -- we have  
22 submitted to the Court a bunch of scientific articles,  
23 expert testimony, experts that would come here to this  
24 court to testify. And I'll proffer that to the Court,  
25 by the way, your Honor. I think that, you know, we

1 are -- we greatly appreciate you having the hearing and  
2 hearing us out. That does not happen in every court.  
3 So I just want to tell the Court how much we appreciate  
4 that.

5 But we also would like to offer to the Court  
6 that we will proffer every expert that is in -- in those  
7 articles that we have submitted to the Court, we will  
8 proffer that. They're -- they would be willing to come  
9 here and talk about the injuries, the deaths, the  
10 disabilities, and other problems that have occurred from  
11 this vaccine. They would be willing to talk about how  
12 the JAMA article is fundamentally flawed in its  
13 analysis. There's a whole another analysis when you go  
14 back and look at the clinical trial data that show  
15 adverse events, deaths, and no overall effectiveness and  
16 all kinds of safety signals that were obscured from the  
17 FDA -- see, I almost did it again -- the FDA in its  
18 decision-making. That's what we're concerned about.

19 The latest travesty that occurred is the --  
20 is the release of the myocarditis report. I think I  
21 have it down here. 148 pages that was issued by the  
22 CDC. 148 pages all redacted. Where are we as a public,  
23 as a people supposed to get our information in an  
24 emergency? We are -- this is an emergency. The most  
25 crucial thing in an emergency is to tell the truth, have

1 facts, and have our society make decisions about what  
2 should be happening there. We don't --

3 THE COURT: Let me ask a question. You've  
4 indicated various studies that vaccine -- the vaccine  
5 has caused serious illness, perhaps death of  
6 individuals. There is litigation against drug  
7 manufacturers all the time regarding a problem with a  
8 drug that causes death or injury. Why can't these  
9 things be brought out by representing an injured  
10 plaintiff or a deceased plaintiff and go against Pfizer  
11 for having a bad drug essentially is what you're saying.  
12 That's one group of facts and claims and what have you.  
13 But here ours is not so much concern because Ms. Jackson  
14 fortunately didn't become ill or didn't die.

15 She claimed she saw discrepancies in the  
16 testing in some sites here in Texas. Therefore, she  
17 reported that. She was fired. And she says those  
18 discrepancies that she saw caused the -- had they been  
19 considered, the FDA would not have approved the drug.  
20 And since -- because that happened, the government was  
21 duped into paying so much money per vial and that's a  
22 huge sum of money. And that's money that was -- this is  
23 really that the government has been defrauded. It's not  
24 so much because of the testing protocol and what have  
25 you.

1 Now, whether or not the drug itself is a bad  
2 drug, hurts people, kills people -- I mean, that -- if  
3 that's true, it may have its place in court, but  
4 wouldn't it be more in terms of a pharmaceutical  
5 liability case and those can be filed.

6 MR. MENDENHALL: Your Honor, my greatest wish  
7 is that there would be a court that would consider those  
8 claims. What we have now is the Countermeasures Injury  
9 Program. It's called the CICP, Countermeasures  
10 Compensation Program. That program has been the most  
11 paltry response to major vaccine injury that I've ever  
12 seen in my life. I think the average award at that  
13 court has been \$3,000.

14 I can tell you that I have clients right now  
15 that are injured. We're going after worker's  
16 compensation, that's one possibility. We're looking at  
17 disability claims in social security. We're looking at  
18 disability claims in private insurance. Those are  
19 paltry responses to the extent of the injury that's  
20 occurring here. You know, we have people -- I have a  
21 client with transverse myelitis, your Honor. She's in  
22 her forties. She -- I have to help her stand up if she  
23 wants to give a talk somewhere. In fact, her heart is  
24 failing. You know, so, no -- the answer is no. There  
25 is not an adequate compensation for them. There is not



1 adequate liability, and we need to make sure that the  
2 PREP Act, which I believe is unconstitutional, is either  
3 overturned or changed so that people can get  
4 compensation against these companies.

5 THE COURT: But what I'm -- in this case, the  
6 measure of damages sought is not the value of a human  
7 life that's been lost because of an adverse reaction to  
8 the vaccine or something like that. It's that -- it's  
9 like \$20 a vial or some -- whatever the cost was --  
10 times however many vials it was. And that's in the  
11 document. That's -- that's what this lawsuit's about.

12 MR. MENDENHALL: That's right.

13 THE COURT: And whether or not -- this may  
14 sound harsh to say, but whether or not the vaccine hurt  
15 somebody or killed somebody or somebody had an adverse  
16 reaction to it, is not really what this lawsuit is  
17 about. It's about getting that \$20 a vial.

18 MR. MENDENHALL: Well, your Honor, that does  
19 add up to a considerable sum in the hundreds of billions  
20 of dollars.

21 THE COURT: It does.

22 MR. MENDENHALL: And, additionally, we  
23 believe that penalties of over \$20,000 per -- per  
24 administration of the shot and that adds up to  
25 somewhere at this point I think over \$4 trillion, which

1 would bankrupt and cause -- cause Pfizer to be  
2 bankrupted and sold off in bankruptcy court.

3           So the damages and the penalties are very,  
4 very substantial here. And the damage to the  
5 taxpayer -- that's what we're addressing here. The  
6 damage to the taxpayer is in the hundreds of billions of  
7 dollars because we have paid for essentially a bullet  
8 that blows up in your face and injures some percentage  
9 of the people who shoot it. And it's not an  
10 insignificant number.

11           So the product that's been provided to the  
12 Department of Defense is flawed, faulty, ineffective,  
13 and unsafe and is injuring our troops and it's injuring  
14 our citizens. And it is not providing effectively for  
15 the national defense. So that's a serious problem. And  
16 we think that this is literally in the mine-run of  
17 qui tam False Claims Act cases dealing with military  
18 procurement where we got faulty blankets and shoes with  
19 cardboard soles and bullets that didn't work. You know,  
20 so it's in the mine-run, but we have to change how we  
21 think about it. We have to remember this is a defense  
22 contract that gave us a product that's blowing up in our  
23 faces. And we have got to hold those defense  
24 contractors like Pfizer accountable for that. And  
25 that's -- you know, that's our position on that.

1 THE COURT: But -- and back to the issue.  
2 Without all of the scientific evidence that you want to  
3 proffer about the ineffectiveness of the drug or even  
4 the dangers of the drug, the real issue here is were  
5 test protocols followed so that the FDA approval was  
6 valid. That's really what this case is about. And also  
7 she reported it and got fired and she has a retaliation  
8 claim -- let's don't lose sight of that -- and that is  
9 also a part of this lawsuit. That's really what this  
10 lawsuit is all about.

11 MR. MENDENHALL: Again, it falls right down  
12 the mine-run of defense department cases where the  
13 improper testing of whatever military equipment went on  
14 and then the military equipment failed in the field.  
15 And they run it back to see what happened with the  
16 testing. It was bad, faulty, inappropriate.

17 Did you have something --

18 I'm sorry, your Honor. I've got such  
19 esteemed colleagues here.

20 THE COURT: Right. Everybody wants to get in  
21 on that. Well, I'm sorry. I probably got you out of  
22 your stride. I'm going to let you get back into your  
23 argument. I'm going to listen more. You probably -- do  
24 you have some more you want to argue?

25 MR. MENDENHALL: I just want to make sure I

1 go through a couple of other --

2 THE COURT: Go ahead. I'll listen.

3 MR. FRIEDMAN: Can I just respond to the  
4 question that you asked?

5 THE COURT: Is this like a good wrestling  
6 match? You tag-teaming here?

7 MR. FRIEDMAN: Is that okay?

8 THE COURT: Tag team.

9 MR. FRIEDMAN: Okay. Thank you, your Honor.  
10 The proffer of proof about bringing in  
11 experts to show that this thing is causing injuries and  
12 it's ineffective, that's part of what we're saying the  
13 evidence would be. But the Cureus article that was  
14 authored in part by Peter McCullough doesn't just go to  
15 the fact that it's caused all this harm. He goes into  
16 all of the proof of what Brook Jackson and what our case  
17 says, which is they committed clinical fraud because the  
18 clinical trials are very well controlled, very adequate.  
19 They're supposed to be. And if you have a drug that's  
20 going to cause injury, the clinical trials will catch  
21 it. You can't just lie about one little thing. The  
22 clinical trials have cross-checks to make sure that if  
23 this vaccine doesn't protect against infection and if  
24 this vaccine causes injury, then the clinical trial will  
25 show that.

1           So the only reason why people got injured by  
2 taking this is because Pfizer was lying in their  
3 clinical trials to get the emergency use authorization.  
4 So that's where the connection is. We're not suing on  
5 the injuries to the people. We're suing for the  
6 clinical fraud that allowed those injuries to happen.  
7 And if those clinical trials were conducted correctly,  
8 this thing never would have happened. And that's why  
9 they're trying to cover it up. That's why the  
10 Department of Justice -- the Department of Justice is  
11 not saying that there was some sort of reason why we  
12 should allow clinical trial fraud. They're saying the  
13 vaccine is safe and effective. What's their evidence?  
14 The clinical trials. They're relying upon the clinical  
15 trials to support their opinion that it's safe and  
16 effective.

17           So we presented a lot of evidence about how  
18 the vaccine is causing injury, but that wasn't to show  
19 what our case is about. That's -- those injuries came  
20 about because of the fraud in the clinical trials. And  
21 even the Department of Justice's position before this  
22 court right now that it's safe and effective and it has  
23 saved millions of lives, that depends upon the integrity  
24 of those clinical trials.

25           THE COURT: Okay. Thank you very much. I

1 appreciate that. And, by the way, I will, as is  
2 customary, give the movant an opportunity to make a  
3 response. But I do feel like Mr. Gillingham may want to  
4 address that. At least I would ask him to address that.

5 Assume everything they say is true and I  
6 know -- perhaps you just assume it's true -- bad test  
7 protocol that ultimately led to a drug that is  
8 dangerous. Just assume that's true. Given the  
9 procedural case that we're in now, a qui tam action to  
10 recover for fraud on these vials that were sold to the  
11 Department of Defense, if the government can evaluate  
12 all that evidence and still say we don't want to pursue  
13 it, is that really under Supreme Court precedent? Is  
14 that really what the law is? I'll give you a chance to  
15 respond in a moment, but I think that -- maybe given  
16 what we've heard, that is perhaps the question that we  
17 need to hear a response to.

18 All right. Go ahead.

19 He's checking his notes. You've got him off  
20 his tracks.

21 MR. MENDENHALL: No. No. No. Jeremy, I  
22 always appreciate -- you can't imagine the hours we've  
23 spent discussing these issues, your Honor.

24 You know, just in closing -- you know,  
25 this -- this -- the FDA seems to be requesting, you

1 know, basically carte blanche to dismiss. You know,  
2 that their own motion to dismiss is the reason to come  
3 in. I just think that is not what *Polansky* was about.  
4 *Polansky* didn't really get to good cause anyway. It's  
5 just on the 41(a). But once -- and once they're in the  
6 case, you know, I get the 41(a) and they're leading  
7 it -- so once they're let in, you know, they do gain  
8 control, your Honor.

9 THE COURT: Well, what is good cause in your  
10 opinion under 31 U.S.C. § 3730(c)(3)?

11 MR. MENDENHALL: Well, it's not to make a  
12 claim on health policy that goes right to the issue of  
13 whether the data the health policy is based on is  
14 fraudulent or not. That's certainly not it. It's not  
15 to dismiss. I think there has to be some reason. They  
16 have to show that the federal government has some  
17 burdens that are beyond just the normal burdens of  
18 observing a case go on, on its own. You know, the  
19 burdens that we've seen in the other cases. And I think  
20 maybe it is a case-by-case analysis. Every case we  
21 looked at had a burden. It had a relator who wouldn't  
22 agree to -- to what the penalties were. It had a  
23 relator who messed up the discovery. It had a relator  
24 who messed up the trial -- the court process. You know,  
25 it had relators that the government also had tried to

1 work with. We haven't had any -- you know, any  
2 involvement with the government. We've required nothing  
3 of them.

4 And they're not having to work on discovery  
5 or anything with us at this point. Furthermore, your  
6 Honor, I want to point this out: We actually -- we  
7 recognize that the United States has an important role.  
8 They may want to intervene. This is just not the time.  
9 And they may want to intervene later, but they haven't  
10 shown any burdens right now. Maybe we do become  
11 burdensome on the government later. I believe that's  
12 possible. And if we do become burdensome and they have  
13 good cause at that point because we've created a burden  
14 or there's a real problem that we've created in our  
15 litigation, I think that's -- I think it's perfectly  
16 reasonable for them to come back to this Court and say,  
17 hey, we have this problem with discovery, the relator  
18 won't let up on us and they don't even need it and boom,  
19 boom, boom. So there are things that I think could come  
20 in later.

21 So a dismissal today, you know, I think,  
22 anyway, would be a dismissal -- would be a dismissal  
23 without prejudice. I think if they had evidence that  
24 there was a burden and the judge would have to be the --  
25 you know, your Honor would have to be the arbiter of



1 where that threshold is -- you know, they could come in  
2 later actually and move to dismiss the case.

3 THE COURT: As you know, courts are not  
4 political. Decisions by an agency, decision to -- by  
5 the Department of Justice, Department of Defense to  
6 pursue an action may be political in nature. How can a  
7 court even interfere with what might have some -- a  
8 political component to it? In fact, if there is  
9 criticism of the government for its decision with regard  
10 to the vaccine, isn't that really a political decision  
11 and citizens are free to do whatever they do politically  
12 to address that? But it's not in the purview of the  
13 courts to get involved in that.

14 MR. MENDENHALL: Well, your Honor, I agree.  
15 The Court should look at it as not political. And the  
16 relator's --

17 THE COURT: I mean, I'm stuck with Supreme  
18 Court decisions and rules of procedure and -- I mean,  
19 that's what the law is, you know.

20 MR. MENDENHALL: But I'm going back to the  
21 Senate report, and Senator Grassley has been very clear.  
22 You know, he helped pass the statute when it originally  
23 passed. You know, and they left flexibility for the  
24 government to intervene later. They left flexibility  
25 for the government to get involved in these cases later,

1 but they didn't leave it without a check and a balance.  
2 And the first check is the relator, and the second check  
3 is your Honor. And they have to have good cause before  
4 they dismiss this case. And if they have good cause  
5 later, they can come back in. But I tell you it's not  
6 good cause today, your Honor.

7 THE COURT: Okay. All right. Mr. Barnes,  
8 did you want to say anything?

9 Anybody else want to say something on this  
10 side?

11 MR. BARNES: Just briefly, your Honor, to the  
12 Court's question.

13 THE COURT: Yes.

14 MR. BARNES: I think the interest is where  
15 could good cause come into play. The Seventh Circuit  
16 talked about it in one case. It's what happens when the  
17 government's reason to dismiss isn't in the interest of  
18 the American people or the American taxpayer. And in  
19 the Seventh Circuit, they raised what if the reason is  
20 they want to protect the reputation of a particular  
21 businessman? Well, here we have a situation where --

22 THE COURT: Do you know the specific case?

23 MR. FRIEDMAN: The spelling is  
24 C-i-m-z-n-h-c-a.

25 THE COURT: It's in your brief?

1 MR. FRIEDMAN: It's in our brief, including  
2 the sur-reply --

3 THE COURT: I'll look for it. Go ahead.

4 MR. BARNES: Thank you, your Honor.

5 The -- here we have a situation where there's  
6 no -- because going to the Court's question about  
7 politics. Unfortunately, I think politics may have  
8 contaminated the decision here. I think the Court's  
9 role is to keep politics out of it. The Court's role is  
10 to look at this and say, okay, have you given me a  
11 reason that has a nexus to the qui tam's public  
12 policies, the policies it serves? In other words, okay,  
13 you've identified a change of fact or law that makes it  
14 unlikely that this case is going to succeed or you've  
15 got a relator that's impossible to work with that's  
16 going to make it more costly, more risky than reward to  
17 get the benefit, but it needs to relate to the public  
18 policy of the statute. As opposed to here we have a  
19 situation where the fact -- for example, the government  
20 hadn't submitted any declarations under penalty of  
21 perjury.

22 There's nothing from the FDA saying we have  
23 evaluated Brook Jackson's allegations and we have  
24 concluded they're true but we don't care. Or we've  
25 evaluated Brook Jackson's allegations and we've

1 concluded factually they didn't happen. We have none of  
2 that. No evidentiary submission has been made at all by  
3 the government. It also goes to the Court's question  
4 about when might an evidentiary hearing be necessary. I  
5 think when there is a question about the basis for which  
6 the government is asserting good cause. The government  
7 says they're entitled to it. I think their phrase is  
8 "virtually entitled." That isn't what the Senate report  
9 shows. That isn't what the statute itself says. That  
10 isn't what the Federal Rules of Civil Procedure provide  
11 for. Nor is it --

12 THE COURT: The statute is silent as to good  
13 cause.

14 MR. BARNES: It is, your Honor.

15 THE COURT: Uh-huh.

16 MR. BARNES: So what does that mean? I think  
17 if the intention of the Senate and the Congress was to  
18 have no limitations, it would have had no limitations.  
19 It wouldn't have had any role for the Court. It would  
20 have said the government can intervene any time it wants  
21 without any reason or basis given. That no -- like, for  
22 example, when we see the phrases "notice and to hear it"  
23 in the statute, well, that comes within the broader  
24 context of procedural due process. And we look at  
25 what -- what do we mean by that? Normally we mean

1 notice and a hearing on the merits and a hearing that  
2 has evidence if, as the Court mentioned, what if there's  
3 facts in dispute.

4 THE COURT: How much due process is due? A  
5 full trial in front of a jury?

6 MR. BARNES: Only, I believe, if the  
7 evidence -- if it there is a factual dispute. The Court  
8 pointed out a very good question the government can  
9 answer or address in a minute. But here it appears the  
10 government is disputing the facts. In other words, the  
11 government is saying we don't want anyone to believe  
12 that the vaccine is not safe or not effective or a  
13 vaccine. And the -- not because they fully have any  
14 testimony that they've researched our allegations and  
15 found them to be untrue or immaterial. Solely because  
16 there's an official public policy of the current  
17 administration that states that. That doesn't sound  
18 like good cause. That doesn't have a nexus to the  
19 underlying qui tam's public policy purposes. That  
20 sounds like there's people with a lot of reputations  
21 that would be damaged if the world found out they  
22 vouched for and mandated even a vaccine that wasn't a  
23 vaccine, wasn't safe, and wasn't effective. That's the  
24 kind of thing the Seventh Circuit is talking about.  
25 What if the motivation doesn't relate to the qui tam

1 motivation.

2 In other words, are they moving to dismiss  
3 because it doesn't serve the American taxpayer's  
4 interests for this case to move forward? That's what  
5 every single case where any dismissal has ever happened  
6 in the qui tam -- that's been the government's good  
7 cause. This is not in the taxpayer's interests because  
8 it's not worth the risk reward. And I -- I recognize  
9 what the Court says that that decision is something that  
10 the judicial branch defers to the executive branch for,  
11 but that isn't what they've said here. What they've  
12 said here is we have an official public policy that says  
13 we can't have that public policy exposed as being based  
14 on bad data, bad science. That's not what the qui tam  
15 is about.

16 The qui tam isn't about protecting the  
17 reputation of people in power or that they currently be  
18 there or to help them or hurt them in an upcoming  
19 election. It's what is the benefit to the American  
20 taxpayer? And here, going to Mr. Mendenhall's last  
21 point, the Court can deny their motion to intervene at  
22 this point without prejudice. They can come in and give  
23 a roadmap to the government because this is somewhat  
24 unprecedented -- this kind of basis for a motion to  
25 dismiss -- and say here's what good cause is, provide an

1 evidentiary foundation for it. And then I believe if  
2 there's disputes between us on that evidence, then  
3 evidentiary hearing on that limited question as to does  
4 this serve the taxpayer's interests because here they  
5 haven't even given any evidence at all that it does.  
6 And that's why we say it doesn't meet good cause, your  
7 Honor.

8 THE COURT: All right. Thank you very much.

9 MR. BARNES: Thank you, your Honor.

10 THE COURT: Anything further?

11 All right. Oh, yes. Okay. Come forward,  
12 Mr. Friedman.

13 MR. FRIEDMAN: I'm sorry. It ties in with  
14 what Mr. Barnes was saying. If you're going to look at  
15 the question of good cause to intervene to dismiss in  
16 this case, you need to see it in the context of what the  
17 False Claims Act is trying to achieve. Nothing would  
18 undermine the False Claims Act more than telling the  
19 other future "Brook Jacksons" of the world, if you know  
20 about fraud in the development of these drugs, don't  
21 come to us, we don't want to hear about it because our  
22 government stands behind vaccine manufacturers.

23 The dismissal here that the DOJ is asking for  
24 is an attempt to try to send a signal to everybody else,  
25 that despite the fact that you might have a meritorious

1 False Claims Act case, don't come forward. And what  
2 Mr. Mendenhall said is that -- we refer to the letter  
3 that Senator Grassley wrote to the Department of Justice  
4 saying that your assertion of an unfettered right to  
5 dismiss cases, which is very similar to this unfettered  
6 right to intervene to dismiss any time we want, that is  
7 the worst thing you could do for -- not you, your Honor,  
8 what the Department of Justice would do, to hurt the  
9 functioning of the False Claims Act.

10 When they made those changes in the  
11 amendments in 1986, they transformed this law that had  
12 remained dormant from 1944 to 1986 because there was a  
13 government knowledge defense. If the government knew  
14 about the information of the fraud, you couldn't bring a  
15 lawsuit. And they said that's not good because there  
16 are people who know about fraud and they don't want --  
17 they'll never come forward if what they think is they'll  
18 come forward and nothing will ever happen. So you'll  
19 never encourage the relators to come forward with  
20 knowledge of the fraud if you have a rule that says if  
21 the government doesn't want to pursue it, don't come  
22 forward. And so that's why the qui tam provisions make  
23 an assignment directly from Congress to Brook Jackson.

24 It's not an assignment to the Department of  
25 Justice to then hire Brook Jackson and her lawyers.



1 It's an assignment to Brook Jackson and other relators  
2 to enforce this action on behalf of the United States.  
3 The government has an amazingly important role in that;  
4 that they can intervene to dismiss when good cause  
5 exists, when there's a good reason. And even if they're  
6 already part of it as part of the intervention as of  
7 right, they still have to have a good reason. It can't  
8 just be we want it dismissed because our politicians  
9 have decided that we want to support this. So in terms  
10 of the good cause standard and Mr. Barnes's argument  
11 that it needs to be interpreted and consistent with the  
12 False Claims Act, that would require a denial of this  
13 motion.

14 THE COURT: I have a question for you. Under  
15 313 U.S.C. § 3730(c)(1), it's still -- the statute says,  
16 I think, that the primary responsibility for pursuing an  
17 action is the government's, not the relator. Do you  
18 agree with that?

19 MR. FRIEDMAN: I agree that once the  
20 government is a party, they have primary responsibility.  
21 So they first have to be able to get into the case and  
22 then they have primary responsibility.

23 THE COURT: Okay. If they get into the  
24 case --

25 MR. FRIEDMAN: If they get in the case, then

1 they have primary responsibility --

2 THE COURT: And then if they decide, hey,  
3 these defendants over here haven't answered yet, they  
4 have a motion to dismiss on file, we're going to cashier  
5 this case.

6 MR. FRIEDMAN: In the mine-run of cases, yes,  
7 your Honor. However, this is not the mine-run of cases.  
8 And all of the courts, including *Polansky* in Footnote 4,  
9 says that there is a constitutional floor. And, you  
10 know, the Department of Justice lawyers say there's due  
11 process and equal protection. But that's not the only  
12 provisions of the constitution. In fact, the First  
13 Amendment protects the right to petition, just like it  
14 protects the right to free speech. In fact, they  
15 correlate together. The same rules about free speech  
16 apply to freedom of petition because your right to  
17 petition is an exercise of speech rights in a court or  
18 in some other adjudicatory process.

19 So in this case -- for example, I posit this  
20 question: Could the government say, Brook Jackson,  
21 don't go into the public square and say that Pfizer  
22 committed fraud in the clinical trials because we think  
23 the Pfizer vaccines are great and we're not going to  
24 allow you in the public square to articulate your  
25 opinion that these -- clinical trial fraud is

1 responsible for all this harm? And the answer is, no,  
2 they can't do that. The First Amendment protects it.  
3 How is this any different? They're going into this  
4 court and saying we're not allowing Brook Jackson to  
5 express her opinion in this case that Pfizer committed  
6 clinical trial fraud to make this thing happen, make  
7 this debacle happen, and the attempt to try to cut --  
8 terminate her right to petition the government on this  
9 theory because of the content of her, because of the  
10 viewpoint of her, and because it's her. And we know the  
11 government doesn't like what she has to say because it  
12 undermines what they've done with this vaccine.

13               So, yes, your Honor, the government does have  
14 a predominant interest once they are a party. However,  
15 they first have to have good cause to come in at this  
16 late stage to become that predominant interest. But  
17 even if they had intervened early on, if they decided to  
18 terminate it in violation of the First Amendment or the  
19 separation of powers, which -- the Department of Justice  
20 didn't even address the separation of powers. We -- we  
21 put an opposition -- that's the Seventh Circuit with the  
22 difficult name to pronounce -- that said you have to  
23 consider the separation of powers. It should weigh  
24 heavily in any good cause determination if what the  
25 reason why they're trying to terminate a case is because

1 it's going to embarrass or expose some sort of financial  
2 interest in some executives.

3 So this separation of powers argument is  
4 extremely important even with the government having a  
5 predominant interest. And the Department of Justice has  
6 waived their argument in opposition at this stage. If  
7 the motion is denied without prejudice, they can bring  
8 it again, they can put in actual evidence, and we would  
9 then petition for an evidentiary hearing to prove the  
10 things that we've offered.

11 THE COURT: Okay. All right. Thank you very  
12 much.

13 MR. FRIEDMAN: Thank you.

14 THE COURT: I'll give the government a chance  
15 to respond.

16 MR. GILLINGHAM: Thank you, your Honor. I'll  
17 try and respond to the tag team here. I mean, Eastern  
18 District of Texas, as you know, one riot, one ranger, so  
19 I'll -- you'll be stuck with me.

20 A few points, your Honor. The purpose of the  
21 False Claims Act is to protect the government from  
22 fraud. This is not a general purpose statute to  
23 litigate any concerns outside of that. I think we heard  
24 from Mr. Mendenhall of FOIA issues regarding the  
25 myocarditis report. That's a FOIA issue. That can be

1 litigated in FOIA. That has no bearing on what's  
2 happening here.

3           Whether or not he believes the PREP Act is  
4 unconstitutional. Again, these are not issues that need  
5 to be litigated here. The False Claims Act is not the  
6 ultimate entry point for any litigant to address  
7 concerns they have with the government's actions. And  
8 that's exactly what's happening here. It seems like  
9 there's an attempt to usurp the False Claims Act and  
10 move it away from what it is, which is an effort for the  
11 government to protect itself from fraud, from paying for  
12 something it shouldn't have paid, into a general attack  
13 on the COVID vaccine.

14           I think Mr. Mendenhall mentioned that there's  
15 no burden on the government. They haven't imposed a  
16 burden on us at this point. And that may be true. This  
17 is early, but we have had to come in and file a  
18 statement of interest, your Honor. And even in the  
19 earlier hearing -- I believe it was back in March --  
20 Mr. Mendenhall himself argued that we need discovery --  
21 we also need discovery from the federal regulator and  
22 the FDA and talk to them about what their standards are.  
23 That's on Page 108, Line 18 through 109, 1, your Honor.

24           This isn't some, like, mere possibility in  
25 the future. I could go through plenty of statements in

1 the briefing and -- you know, setting aside all of the  
2 public -- the public statements on social media and  
3 otherwise. The relators are coming after the government  
4 here. They're arguing that we're corrupt, that we're in  
5 bed with Pfizer, attacking our individual attorneys  
6 saying they're going to need discovery to prove all  
7 this. Again, your Honor, the False Claims Act is  
8 designed to prevent our interests and that our interests  
9 are predominant. And here we've done the kind of cost  
10 benefit analysis that we -- I think Mr. Barnes said, you  
11 know, that generally this is an issue where there's some  
12 sort of cost benefit analysis in these cases that hasn't  
13 been done here.

14 I think that the problem is, your Honor --  
15 and I would invite you to look at Page 7 of our motion  
16 to dismiss. Yes, the concluding line on that references  
17 that the government shouldn't be forced under these  
18 circumstances to pursue a case that's inconsistent with  
19 its public health policy. And I agree with that. But  
20 the preceding paragraph talks about the concerns about  
21 the viability of the case given what the FDA knew and  
22 what it's continued to see through things that happened  
23 after the EUAs ended and also the burdens of litigation,  
24 which are very clearly going to be coming. I guarantee  
25 you that if this goes into litigation, we're going to

1 get buried by -- by not only the defendants, but now  
2 apparently in addition to defending discovery from the  
3 defendants, we have to prove that we're not corrupt?  
4 No. For a case that we've evaluated has little chance  
5 of success and these burdens coming, this is exactly the  
6 sort of thing that does establish good cause for the  
7 United States to say enough is enough.

8 I think -- you know, a couple of other  
9 points, your Honor. We heard about the right to  
10 petition. You know, the Footnote 4 in *Polansky* talked  
11 about constitutional concerns. It identified due  
12 process and equal protection. I work in the False  
13 Claims Act space, and I have never heard of a court  
14 concerning a First Amendment right to pursue a False  
15 Claims Act case. And it really doesn't make sense, you  
16 know. If you go back and look at *Blackstone* or *Stevens*  
17 and talk about the limited assignment of rights to a qui  
18 tam relator, they're -- those would have derived from  
19 what the government's right as the real party in  
20 interest were. And the government doesn't have a  
21 First Amendment right to petition, and Ms. Jackson is  
22 not prevented from petitioning.

23 THE COURT: Well, this is not the public  
24 square. This is a courthouse.

25 MR. GILLINGHAM: It's not the public square.

1 It's not a courthouse. And from the -- from what we see  
2 in the courthouse today, clearly Ms. Jackson has not  
3 been prevented from putting her message out there. She  
4 can pursue other avenues. As your Honor hinted at  
5 before -- I mean, if she's concerned about the decision  
6 on the EUAs, the proper procedure to challenge final  
7 agency action is through the Administrative Procedures  
8 Act. And, believe me, we have seen multiple APA cases  
9 involving all aspects of COVID since -- since this has  
10 taken place. If there's concerns about what the FDA is  
11 doing, there are citizen petition rights.

12 But, again, the False Claims Act is not a  
13 catchall for people who want to voice concerns about the  
14 government policy. It simply doesn't apply here. As  
15 for separation of powers, I'll mention it briefly. We  
16 didn't spend a lot of time addressing this in the brief.  
17 I think that the courts have considered separation of  
18 powers issues. You know, this was not an issue for the  
19 Supreme Court there. And some of these arguments --  
20 both the right to petition and the separation of powers  
21 issues, these would be exceptions that swallow the rule.

22 If -- if the government moving to dismiss,  
23 which is provided for by Congress in the statute somehow  
24 was violating the First Amendment or the separation of  
25 powers in a way that it shouldn't be allowed to, then



1 that would read those out of the rule, your Honor. And  
2 I haven't seen any cases, including the *Polansky* case,  
3 where the Court found that the separation of powers  
4 issue was something that prevented the government from  
5 proceeding there. And also, your Honor, we have to keep  
6 in the back of our mind that, you know, the executive  
7 was assigned in the constitution, the take care clause,  
8 to take care that the laws were enforced.

9 And, of course, cases like *Heckler v. Chaney*  
10 say that the government's decisions in terms of whether  
11 or not to prosecute or how its administrative priorities  
12 are done are ill-equipped for the courts to handle, and  
13 they should -- the Court shouldn't second-guess whether  
14 or not something is prosecuted. And that's similar to  
15 this. You know, we didn't choose for this case to be  
16 filed. We investigated it, dealt with it, and now we've  
17 decided to end it. Much like the courts can't step in  
18 and tell the prosecutors down in the Beaumont office,  
19 like, hey, you have to go prosecute this particular  
20 person. It's a similar concern here, your Honor.

21 And, you know, I hear the concern that we --  
22 that this dissuades relators, your Honor. I don't  
23 really know how to -- exactly the way to respond to  
24 that. You know, relators know what they're getting into  
25 when they file the case. They're eventually going to

1 become public that they filed the case, and there is  
2 always a chance the government steps in to dismiss.  
3 It's not a surprise. It's in the statute. And, your  
4 Honor, before assuming my current position, I was in a  
5 firm as a civil enforcement attorney. It's all I did.  
6 Relators were essentially my clients. Like, we love  
7 relators. We want them to bring the cases because they  
8 help afford the government the ability to do what it  
9 does in protecting itself from fraud.

10           The last -- the last thing, I think, I -- you  
11 know, I'll try to address your Honor's hypothetical.  
12 This -- I want to be very clear. I think that the  
13 government very much disagrees with the premise there.  
14 But I believe your Honor asked us -- and maybe if you  
15 restated it, it would help me just to make sure I'm  
16 addressing it properly. I think the idea was if we  
17 assume that everything is a lie, would the government do  
18 something different? Is that close?

19           THE COURT: If all of the complaints that  
20 Ms. Jackson has about the process and about the dangers  
21 of the -- of the vaccine were true -- given all that --  
22 just accept it as true -- could the government still  
23 decide on their own we don't want to pursue this action  
24 and we want -- it's our case and we want to dismiss it?

25           MR. GILLINGHAM: Yes, your Honor. And I

1 think that in this case actually Ms. Jackson did voice  
2 her concerns to the FDA prior to the EUA. They had that  
3 -- they were aware of that. They put out the EUA But I  
4 think it's important to remember this case is not  
5 limited to what Ms. Jackson learned in her two weeks at  
6 one or two locations. The clinical trial was much  
7 bigger than that. The Ventavia locations were a mere  
8 small subset of the overall data that was considered by  
9 FDA. They considered that data, and they actually  
10 considered -- were able to consider what Ms. Jackson put  
11 forth. But the clock doesn't stop there, your Honor.

12           The FDA continues to monitor these things. I  
13 think if -- you know, even in the Danco oral argument  
14 that counsel cited in their brief, the solicitor general  
15 talked about how the FDA continues to monitor the  
16 environment and look for adverse -- adverse events and  
17 can always take -- make changes to the regulatory  
18 landscape. This isn't some sort of switch that turned  
19 off once the EUA was granted. And going back to the  
20 JAMA article, which, again, you know, according to  
21 relators, it's all false and based on lies. The FDA has  
22 access to everything the relators have access to.  
23 Ms. Jackson ended her tenure at Ventavia a long time  
24 ago. There's no new information that she came out of  
25 that was, like, a hidden source that she has provided to

1 the government.

2 Most of the data at issue came from FOIA  
3 requests to the government. It's the government's data.  
4 We have access to our databases and all of the studies  
5 that are cited. These aren't hidden studies that they  
6 just published for purposes of this litigation. These  
7 are studies that are in the public domain. The FDA has  
8 access to this. It simply doesn't have the same  
9 conclusion. And I think that the case law is clear that  
10 if the government has an argument -- a good argument for  
11 why it should be dismissed, even if there is a vigorous  
12 defense and even if the relator may have a different  
13 position, the question is whether or not the government  
14 should be able to dismiss because it's pursuing its  
15 interests.

16 And here we think that the government has  
17 established good cause because of the concerns about the  
18 merits of this weighed against the burdens. And given  
19 that, the government believes it's time to stop the  
20 case from going forward, intervene pursuant to  
21 31 U.S.C. § 3137(c)(3), and dismiss this case over  
22 relator's objections pursuant to (c)(2)(A), your Honor.

23 THE COURT: Okay. All right. Thank you very  
24 much. The Court is going to take this matter under  
25 advisement. And we're going to take a brief ten-minute

1 break -- a comfort break for everyone. And then we will  
2 pick up with the defendants' motions and -- I think -- I  
3 would hope you can be very concise in your arguments.  
4 And -- and then -- I don't know if you want to change  
5 tables. That's -- it is a bit interesting to see the  
6 visual here because in most qui tam actions the  
7 government is sitting with the relators. And here  
8 they're with the alleged defrauders. In any event, that  
9 kind of speaks volumes.

10 All right. We're in recess.

11 (Recess taken.)

12 THE COURT: Thank you. And please be seated.

13 All right. And now we will hear from  
14 Ventavia, correct?

15 MS. MCDONALD: Yes, your Honor. I think we  
16 decided that -- whether to retread all the grounds  
17 that's been discussed previously and fully briefed --  
18 I'm going to discuss retaliation first because your  
19 Honor referenced earlier that that claim would  
20 potentially stand were the case dismissed by the  
21 government.

22 THE COURT: Okay. Thank you.

23 MS. MCDONALD: So I'm going to go ahead and  
24 discuss retaliation, which is a claim that only pertains  
25 to Ventavia as Ms. Jackson's former employer, but which,

1 even as amended in the second amended complaint, fails  
2 as a matter of law. And I will discuss the reasons why.

3 First, your Honor, as to Count Five, I'll  
4 discuss the False Claims Act retaliation claim. And you  
5 previously dismissed that claim on two independent  
6 bases. One was that Ms. Jackson failed to allege she  
7 engaged in protected activity within the meaning of the  
8 statute, the False Claims Act; and, two, she failed to  
9 allege that Ventavia knew she was engaged in protected  
10 activity. And so those are the two bases on which you  
11 previously dismissed this claim.

12 She then amended the claim in her second  
13 amended complaint, but nothing has changed with respect  
14 to those two independent bases on which this Court  
15 dismissed her prior claims. And so they must be  
16 dismissed again. I'm going to try to be brief. I know  
17 we're short on time. So as we explained in our brief,  
18 the Fifth Circuit has run a clear line between the kinds  
19 of internal reports that give rise to a retaliation  
20 claim under the False Claims Act and that are, quote,  
21 protected activity under the statute. In order to be  
22 protected activity, the relator must have actually  
23 raised concerns about false claims for government  
24 payment, not nearly criticize the company's business  
25 practices or even discuss regulatory violations,

1 et cetera. And this Court previously dismissed her  
2 retaliation claim on this bases.

3 Ms. Jackson did not cure this issue in her  
4 second amended complaint. In fact, her factual  
5 allegations have not really changed. She continues to  
6 say, as you'll see in her second amended complaint, that  
7 she engaged in protected activity through internal  
8 complaints about participant safety and regulatory  
9 protocol and HIPAA violations, just as she stated in her  
10 first amended complaint. But these allegations, again,  
11 fall short as a matter of law under Fifth Circuit  
12 precedent of rising to what constitutes protected  
13 activity under the False Claims Act.

14 Further, on the second basis that this --  
15 these claims were previously dismissed, as before  
16 Ms. Jackson fails to allege that Ventavia knew she was  
17 engaged in protected activity, which is also required  
18 under the False Claims Act retaliation provision. And  
19 for both of these reasons, Ms. Jackson's FCA retaliation  
20 claim must be dismissed on the same basis as the Court  
21 previously dismissed it.

22 And now when Ms. Jackson amended her  
23 complaint for a second time, she added a state law  
24 retaliation claim. And that one is Count Six in the  
25 second amended complaint, and that claim also fails as a

1 matter of law for reasons I'll briefly discuss. First,  
2 your Honor -- I guess before I get to that, were you to  
3 dismiss the entire complaint, either because -- grant  
4 the government's motion or our motions, we would -- we  
5 would first argue that you should decline to exercise  
6 supplemental jurisdiction over the standalone state law  
7 claim in that instance. So that would be our primary  
8 argument.

9 But second and most importantly, the state  
10 law retaliation claim also fails and must be dismissed  
11 as well. And that is also on two independent bases.  
12 First, the state law retaliation claim is based on  
13 Section 161.134 of the Texas Health and Safety Code,  
14 which does not apply to Ms. Jackson or to Ventavia as a  
15 matter of law because Ventavia is not the type of  
16 healthcare facility governed by that statute. And we  
17 explained this in detail in our brief, and it is --  
18 there is quite a bit written on that. But  
19 Section 161.134, which is the provision under which she  
20 brought her retaliation claim, appears in a narrow  
21 subchapter related to, quote, abuse, negligent, and  
22 unprofessional or unethical conduct in healthcare  
23 facilities. That chapter defines abuse and negligent by  
24 references to a Federal Protection and Advocacy for  
25 Individuals With Mental Illness Act and addresses



1 misconduct against patients receiving chemical  
2 dependency, mental health, or rehab services.

3           And so taking that in context, that section's  
4 retaliation provision protects only the employees of  
5 three types of healthcare facilities; hospitals, mental  
6 health facilities, and treatment facilities. None of  
7 these apply to Ventavia. Ms. Jackson alleged in her  
8 opposition to our motion to dismiss that Ventavia is a  
9 treatment facility under the statute, but it's not. The  
10 term "treatment facility" is defined by reference to  
11 Section 464.001, which lists facilities like hospitals,  
12 outpatient facilities, halfway houses, end quote, and  
13 any other facility that offers or purports to offer  
14 treatment. And then treatment is defined as a planned,  
15 structured, and organized program designed to initiate  
16 and promote a person's chemical-free status or to  
17 maintain the person free of illegal drugs.

18           And so under those definitions, Ventavia is  
19 not a treatment facility because it undisputedly does  
20 not provide programs that promote chemical or drug-free  
21 status. And not only does the plain reading of that  
22 statute defy her interpretation that it is a treatment  
23 facility, but there is some case law interpreting the  
24 statute that disagrees with her interpretation. There's  
25 at least two cases we mentioned in our brief that have

1 held the term "treatment facility" in the statute is  
2 plainly limited to those that provide some form of  
3 chemical dependency or addiction treatment program.

4 And even if the statute did apply to  
5 Ventavia, which we don't believe it does, Ms. Jackson  
6 has not sufficiently alleged the type of violation of  
7 law contemplated by that section. The statute lists  
8 three types of violations; a violation of this chapter,  
9 a rule adopted under this chapter, or a rule of another  
10 agency. And relator's second amended complaint alleges  
11 none of these. And so on those bases, your Honor, we  
12 would respectfully request that you grant our motion to  
13 dismiss and dismiss for retaliation claims both under  
14 the False Claims Act and Count Six under the state law.

15 And then, your Honor, she does request leave  
16 to amend yet again in order to plead a new common law  
17 claim for wrongful termination and additionally to cure  
18 any further deficiencies, and we would respectfully ask  
19 that that request should be rejected with prejudice.  
20 You know, she's had several opportunities to plead a  
21 viable claim, if she has one. As you noted this  
22 morning, you know, her original complaint has been  
23 filed -- was filed three years ago, first amended in  
24 February '22. After this Court's dismissal, she was  
25 given another opportunity to amend. And she could have

1 alleged the wrongful termination claim at common law if  
2 she had that claim at that point. And, in fact, her --  
3 I think her -- her opposition actually states on Page 28  
4 that it would be based on the same facts she's had, your  
5 Honor. So we would ask that you dismiss her retaliation  
6 claim, Count Five and Count Six, against Ventavia with  
7 prejudice and deny her motion to file an amended  
8 complaint.

9 THE COURT: All right. Thank you. Anything  
10 else?

11 MS. MCDONALD: No, your Honor.

12 THE COURT: Thank you very much.

13 Yes. Come forward, please.

14 MR. DAVIS: Your Honor, Scott Davis on behalf  
15 of Icon. Your Honor, despite the extraordinary breadth  
16 of the discussion which you've had so far today, I  
17 believe I can be brief, as the Court requested, because  
18 the reality is the issue that brings us here today is  
19 actually quite simple. The Court may recall you've  
20 already dismissed this complaint once. Counts Two,  
21 Three, and Four of the second amended complaint were  
22 included simply to preserve them for appeal. They're  
23 not at issue today. And, by the way, that determination  
24 that the claim should be dismissed and lacked merit in  
25 the Court's prior ruling is a fact which clearly

1 supports the United States's determination regarding the  
2 likelihood of ultimate success here and is consistent  
3 with their determination that the claim should be  
4 dismissed.

5 But in the event you choose not to dismiss as  
6 the United States has requested, you should still  
7 dismiss Count One -- and that's the only count at issue  
8 except with regard to Ventavia. For Pfizer and for  
9 Icon, Count One is the only issue. It was a fraudulent  
10 inducement claim. And the Court granted the relator  
11 leave to file that claim to potentially cure some of the  
12 deficiencies which led to the prior dismissal of the  
13 other counts. And in response, the relator added 20  
14 paragraphs relating to that count to the second amended  
15 complaint. That's it. Those 20 paragraphs are all that  
16 are at issue in this motion to dismiss.

17 Those 20 paragraphs do not meet the  
18 particularity requirements of Rule 9(b). They don't  
19 specify particular fraud by any of the defendants. They  
20 certainly don't specify fraud as to my client Icon,  
21 which I'll elaborate on in just a moment. But just as a  
22 reminder, the United States attorney mentioned this,  
23 there really can't be fraudulent inducement in this  
24 particular scenario because all of the allegations which  
25 Ms. Jackson makes today were allegations which she

1 provided to the FDA prior to the issuance of the EUA  
2 They were aware of these allegations. There was no  
3 concealment. There was no fraud. And, thus, there is  
4 nothing that can be pled even theoretically that would  
5 satisfy the requirements of the False Claims Act case.

6 And as you mentioned, Judge, this is not a  
7 personal injury case. It's not a political discussion.  
8 It's a fraud claim. It's a claim involving fraudulent  
9 statements made with fraudulent intent for the purpose  
10 of securing payment. And in regard to my client, that  
11 standard can never be met. As a reminder, Icon did not  
12 contract with the government. Icon was not paid by the  
13 government. Icon did not make submissions requesting  
14 payment from the government. Icon did not -- did not  
15 act in concert with Pfizer for the purpose of its  
16 submitting payments to the government. Icon was not  
17 in a position that it could ever be subject to a  
18 False Claims Act. And the relator apparently knows this  
19 because they've never even tried to make specific  
20 allegations that would satisfy the requirements of the  
21 False Claims Act and the particularity requirements of  
22 Rule 9(b) in regard to Icon.

23 At our previous hearing in March, I walked  
24 you through in some great detail all of the allegations  
25 that involved Icon. None of them involved statements at

1 all or representations. None of them involved falsity.  
2 None of them involved sinister. When they amended their  
3 complaint following that dismissal in Count One, they  
4 added those 20 paragraphs I mentioned a minute ago.  
5 They don't mention Icon. None of them are specific to  
6 Icon. They just get lumped in together with the  
7 defendants, but there are no specific allegations made  
8 regarding Icon. In the entirety of the claim, if you  
9 look at Pages 29 and 30 of their response, in their  
10 effort to summarize their False Claims Act allegations  
11 against Icon and, for that matter, Ventavia, again, none  
12 of them involve actual representations. None of them  
13 involve actual falsity. None of them involve actual  
14 fraudulent intent and, thus -- and none of them, in  
15 fact, involve request for payment. And, thus, none of  
16 them, in regard to either Icon or Ventavia, could  
17 possibly qualify for recovery under the False Claims  
18 Act.

19 In essence, Judge, what the relator is asking  
20 you to do today is to ignore your own prior ruling  
21 regarding the merits of this claim, the DOJ's evaluation  
22 of the merits of this claim, the clear Supreme Court  
23 precedent in *Polansky*, and the determination that was  
24 made by the FDA and continues to be made by the FDA with  
25 full knowledge of the allegations that Ms. Jackson

1 brought to them at the time and today as a result of  
2 this litigation. None of that is warranted. If we  
3 focus on the issue, the simple question, did they  
4 satisfy Rule 9(b) for pleading the necessary elements of  
5 the False Claims Act in Count One of their complaint,  
6 the answer is clearly, no, they didn't. They didn't  
7 even come close. They didn't as to any of the  
8 defendants, and they certainly didn't as to mine. And  
9 that failure, together with this Court's prior  
10 dismissal, is a clear demonstration of the merits of the  
11 DOJ's determination that the costs of this litigation  
12 will ultimately outweigh the benefits. And, therefore,  
13 we would ask that the case be dismissed either by virtue  
14 of the government's dismissal or by virtue of our own  
15 motion to dismiss under 12(b)(6).

16 Thank you.

17 THE COURT: Thank you very much, Mr. Davis.

18 And Pfizer is next.

19 MR. WESSEL: Your Honor, I'll be very brief  
20 because I know we spent quite a bit of time last year  
21 talking about the motion to dismiss. And really,  
22 your Honor, the issues are identical here. Your Honor  
23 has allowed amendment to -- for the relator to add a --  
24 bring a fraudulent inducement claim. The issues of  
25 materiality are precisely the same as they were back

1 when we talked about this in March. And they -- the  
2 governing precedent there is the Fifth Circuit's *Harman*  
3 case.

4           The only thing that's changed, frankly, your  
5 Honor, is the government's motion to dismiss. So I  
6 think that the lack of materiality has become even  
7 stronger since we filed our motion and since we talked  
8 about this last year. I'm happy to answer any questions  
9 you might have about that, but that's our position  
10 there.

11           I'd like to just briefly address -- and I'm  
12 not going to get into a lot of point-by-point rebuttal  
13 of relator's allegations. Today is not the first time  
14 they've made unsubstantiated allegations against my  
15 client and they've made unsubstantiated allegations  
16 against many people -- other people in this courtroom.  
17 But, you know, this -- we talked about this is not the  
18 place for a mini trial. But I do think it's important  
19 to just put on the record that if this case does go  
20 forward, Pfizer is prepared to rebut each and every one  
21 of those allegations point by point. And it is very  
22 confident it will be able to do so. The company is very  
23 proud of having developed the lifesaving vaccine in  
24 record time during a pandemic. That -- you know, as the  
25 government talked about in its submission here, along



1 with other vaccines, saved tens of millions of lives.  
2 So I just want to state that for the record. Again, I'm  
3 not going to get into a tic for tac on all of that.

4 We -- I'll mention briefly -- we talked about  
5 the materiality. Your Honor mentioned this issue of  
6 standing, Justice Thomas's dissent, in the *Polansky*  
7 case. I found it to be a very intriguing argument. We  
8 briefed it in our brief. And, you know, we still take  
9 the position that there's an Article II issue there with  
10 even allowing qui tam actions. And, again -- but  
11 that -- that you see in our brief and I don't need to  
12 spend a lot of time on it unless your Honor has any  
13 questions about that.

14 But in conclusion, we would ask the Court to  
15 follow the Supreme Court precedent in *Polansky* and grant  
16 the government's motion to dismiss. And if it declines  
17 to do so, to follow the Fifth Circuit precedent in  
18 *Harman* and grant our motion under 12(b)(6) and 12(b)(1)  
19 and dismiss Counts One through Four of the complaint.

20 THE COURT: All right. Thank you.

21 Anything further from the defendants?

22 Okay. All right. From the relator?

23 MR. MENDENHALL: Thank you, your Honor. And  
24 just to let the Court know, Attorney Barnes is going to  
25 address the 3730(h) part of the argument.

1 THE COURT: All right.

2 MR. MENDENHALL: But I will -- I will attempt  
3 to address some of the other issues that have arisen  
4 here. You know, it is very interesting -- you know, the  
5 statement of interest that was submitted by the  
6 United States last year. And, in fact, the Court's  
7 ruling on -- incorporating the ideas of the statement of  
8 interest. And the fact that we had mentioned fraudulent  
9 inducement, but this Court directed us that there was  
10 a -- a better way to insert that into our complaint  
11 and -- and we greatly appreciated the opportunity to add  
12 the fraudulent inducement count to the complaint. And  
13 we followed the roadmap laid out by the United States.  
14 I think that may be what's happening here. Because, you  
15 know, Pfizer and the defendants do not agree with that  
16 roadmap. They do not believe there could be fraudulent  
17 inducement when you lie and cheat the FDA. But the  
18 United States does not want to give that -- that up.

19 They are -- they are backing that theory of  
20 the case that there can be a fraudulent inducement to  
21 the FDA if bad data is submitted. And we really have  
22 seen -- you know, it's been such an interesting process  
23 because this has gone on for years. And we've got the  
24 most remarkable public effort by experts and citizens to  
25 understand the data that keeps coming out day after day

1 after day showing the inefficiency and effectiveness and  
2 harm that these, quote-unquote, vaccines are causing.  
3 And every bit of data has been borne out and shows that  
4 that clinical trial data is not being reflected in the  
5 populations around the world. It is not being reflected  
6 here in the United States.

7 And, in fact, the injuries that were covered  
8 up, the deaths that were covered up, the effectiveness  
9 that was obscured to show it was effective, all of that  
10 has now been verified by public -- you know, by  
11 scientists operating in the public interest, operating  
12 independently, operating pro bono, and they verified all  
13 of the -- all of what we knew because of the falsity in  
14 the clinical trial. So it shows how important this  
15 clinical trial data is, and it shows this remarkable  
16 effort that I think that the United States unfortunately  
17 has not -- is not respecting what has happened here.

18 So I want to go back up here. You know,  
19 we've listed -- I'm not going to go through the listing  
20 of failures. I think that's on Page 7 of the second  
21 amended complaint. But, you know, there's about a page  
22 of the failures including, you know, the unblinding, the  
23 high adverse events in the control arm didn't look  
24 right. And then we saw the data come out initially in  
25 the first three months of these shots. There were

1 93,000 adverse events that occurred in the first three  
2 months that these shots were, you know, issued into the  
3 public.

4           There were over 300 strokes. One percent of  
5 the population had facial paralysis. You know, over 500  
6 people had neurological damage. We had 38 people that  
7 had MS and 11 that had adverse myelitis. This is in the  
8 public data that was supposed to part of the remainder  
9 of the trial -- the phase three trial, which, as your  
10 Honor knows, was truncated by vaccinating them way back  
11 in December of 2020. So the design of this trial,  
12 this -- this design was -- was set up in a way to show  
13 an effectiveness that was never there and it was to  
14 obscure the problems that were emerging among the trial  
15 participants and it obscured the impact on the public.

16           They destroyed the control group in December,  
17 like I said. They didn't report adverse events, and  
18 they falsely counted the vax as unvax. And I've gone  
19 over this a little bit before. But, you know, all I'm  
20 trying to say is we amended the complaint based on the  
21 federal government's guidance, based on this Court's  
22 guidance, to go after fraud in the inducement. That's a  
23 theory that the federal government actually backs. I  
24 don't think they want a ruling on that. I think that's  
25 why they've come in and have moved to dismiss at this

1 time.

2 And I'll let Bob follow up on the 3730(h)  
3 retaliation part.

4 THE COURT: Yes. Okay. Thank you.

5 MR. BARNES: Thank you, your Honor. I  
6 appreciate that the Court afforded this generous hearing  
7 as it did before so that all parties could be heard.

8 It was interesting what the government said  
9 earlier when it suggested that there were other places  
10 and mechanisms of suit. But point in fact, if you're  
11 injured or harm is caused from this drug because there  
12 was -- Dr. Davis submitted to the government -- you  
13 can't sue under the PREP Act. Everybody is immune. So  
14 if you're injured, out of luck. If -- the government  
15 suggested, well, they could always sue under the APA.  
16 Well, I would know something about that because I filed  
17 a suit against the FDA on behalf of Robert Kennedy and  
18 Children's Health Defense. And what was the  
19 government's position? Oh, no, actually, you can't. No  
20 standing to sue and to challenge the FDA's ruling.

21 And now they say you can't sue even when you  
22 found the fraud and were the first to find it like  
23 Brook Jackson. This just leaves us with one little thin  
24 effort at the petition of redress of grievance as  
25 preserved under the First Amendment for Brook Jackson

1 and that is her retaliation claim against Ventavia.  
2 There's -- we amended the facts of the complaint because  
3 the Court originally noted there wasn't a connection --  
4 there was no fraud inducement claim originally brought;  
5 and, thus, there was no connection between her protected  
6 activities and the fraud claim. That has been remedied  
7 by the amendment.

8 Now, everything she was -- why did she get  
9 fired? It's kind of obvious. She reports it to the  
10 FDA. She tells them the day before she's going -- this  
11 can't continue. That they can't continue to enroll  
12 people. They've agreed not to enroll people. She goes  
13 to the FDA. That afternoon she's fired after she  
14 reports to the FDA. The connection to the false claim  
15 is that they were falsifying information to the FDA for  
16 the fraud and the inducement to get the money. The  
17 Court's point was that that connection wasn't originally  
18 in the complaint -- in the first amended complaint. It  
19 now is in the second amended complaint.

20 So under the very liberal standard afforded  
21 pleadings, we've alleged sufficient facts to at least  
22 reach the discovery stage of the case as it concerns  
23 3730(h). Secondly, as to the Texas Health and Safety  
24 Code, I would note that the provisions --

25 THE COURT: Let me interrupt just a second.

1 MR. BARNES: Yes, your Honor.

2 THE COURT: I think in their motion, they --  
3 they're saying that you didn't specify the fraudulent  
4 acts as to each of the individual defendants. Do you  
5 have a response to that complaint?

6 MR. BARNES: Yes, your Honor.

7 THE COURT: That issue they raise?

8 MR. BARNES: Yes, I do. I don't think that  
9 would relate to the retaliation claim. I think that  
10 would relate to the other --

11 THE COURT: Yeah. Well, it really does. But  
12 when you said that, it made me think about that.

13 MR. BARNES: Yes, your Honor. Understood.  
14 The -- there is specific allegations, but here you have  
15 three parties working together to submit the emergency  
16 use authorization information in order to get payment  
17 under the contract. So our allegation is -- is specific  
18 to individual -- individual defendants when it's  
19 applicable, but in many cases they're acting jointly.  
20 And they're acting for joint benefit and for joint  
21 objective and they're involved in joint fraud. And  
22 there are supervisory relationships between them. There  
23 are other agency relationships between them that we  
24 allege. But if the Court goes back to what this Court  
25 discussed last time, which was what Justice Thomas said

1 in *Aguilar* -- said if you're trying to figure out if  
2 there's a fraud, look at the essence of the bargain.  
3 Don't worry too much about the formalities and  
4 technicalities. What's the essence of the bargain? The  
5 essence of the bargain is the defendants joined together  
6 and promised to the defense department that they would  
7 deliver something specific; a safe, effective vaccine  
8 for the prevention of COVID-19. Not as a diagnostic,  
9 not as a therapeutic, but as a true inoculation. And  
10 that's what's repeated throughout the defense  
11 department's statement of work. That's what's in the  
12 defense department contract. And they are collectively  
13 working to achieve that. They're making arguments  
14 about, well, Pfizer is the one that technically asked  
15 for the money and then we got paid from Pfizer. Or  
16 Ventavia was actually doing the clinical trials and  
17 Pfizer was just supervising. But they're acting  
18 collectively for a joint effort, for a joint benefit  
19 from the government.

20 And the problem is we look at the essence of  
21 the bargain. Why is this fraud? If we're just -- we  
22 get away from all the technicalities and formalities.  
23 It's they promised to deliver a safe, effective vaccine  
24 for the prevention of COVID-19. And what they  
25 delivered, because they doctored the clinical trial data



1 to get the false emergency use authorization, is a  
2 dangerous, ineffective drug that doesn't inoculate  
3 against anything. So it's not even a vaccine, and it  
4 doesn't prevent COVID-19.

5           The whole essence of the bargain -- the  
6 reason why the defense department was offering this  
7 incredibly lucrative billions of dollars project was for  
8 this extraordinary delivery at speed and scale of a  
9 vaccine that most people thought couldn't be delivered  
10 and still be safe and still be effective and still be a  
11 vaccine and prevent COVID-19. Coronavirus is notorious  
12 for evading vaccines. What Brook Jackson figured out  
13 was that they knew they couldn't deliver that. That's  
14 what she was witnessing. She didn't realize that. She  
15 spent almost 20 years trying to make sure we had safe,  
16 effective medicine; safe, effective vaccines.

17           She gets there and all of the rules are being  
18 thrown out. You have bags with needles sticking out of  
19 them. You have people's private medical information  
20 plastered on the walls for anybody to read. You have  
21 people being rolled out in the hallways and not even  
22 being monitored. You have people being completely  
23 unblinded. The whole basis of all clinical trial  
24 success is protection of blinding at all costs. Here  
25 you have everybody being unblinded. Anybody can see

1 what's happening. You have people bringing in their  
2 friends and their family members and other people and  
3 paying them under the table. Why? Because they  
4 couldn't deliver at speed and scale what they were  
5 promising the government they could. But there were  
6 billions of dollars on the line. And that's a mighty  
7 temptation.

8           And when she brought up -- Brook Jackson  
9 said: We've got to fix this. Let's just stop  
10 enrollment. Let's just fix this. She wasn't trying to  
11 undermine it, trying to prevent it, trying to preclude  
12 it. She just said: Let's make sure we can fix it so we  
13 do the clinical trial data right so the world can have  
14 confidence that this will be safe, that this will be  
15 effective, that this will work. And as she kept  
16 documenting it, you know, with photographs, texts, and  
17 other information -- when she brought it in, they were  
18 shocked at how much documentation she had. They had  
19 been slow rolling her for weeks. And then they were  
20 like: What have you done? How in the world did you  
21 take photos? Like, we've just got to focus on  
22 delivering what we've promised everyone we're going to  
23 deliver. And that's when they said: Well, maybe you  
24 need to go home, but didn't terminate her or anything  
25 else.

1           So she reaches out to FDA and says, you know,  
2 here's the problem, basically we can't deliver a safe,  
3 effective vaccine at speed and scale because we can't  
4 even honor the very basic limits of honest clinical  
5 trial data. We can't deliver it, details it. That  
6 afternoon she's fired. That afternoon she's terminated.  
7 And then she risks her entire future and career to bring  
8 this to the attention of the United States Government.  
9 Who for more than a year told this Court that they were  
10 seriously and sincerely investigating the allegations,  
11 that they were doing a thorough review of it. We still  
12 never seen what the product of that thorough review is.

13           But now when they come in and step in late  
14 and ask for it all to be dismissed and for the very last  
15 case -- the very only case that can ever get any remedy,  
16 any truth for the American people is this case. Because  
17 of all the immunities, because of all the standing  
18 limitations, because of all the special provisions  
19 applicable to this very unique public health  
20 controversy, this is the only case the American people  
21 have a chance for the judicial branch to have a role.  
22 Because without it, we are stuck in a situation where  
23 the American people are left in the dark. The American  
24 people are left out. The American people, who the  
25 qui tam law is supposed to be there to protect and

1 enforce, is the very law used to abandon them in the end  
2 if the government is to have its way.

3           She provided under the same Texas Health and  
4 Safety Code, your Honor -- it's very broad. It talks  
5 about treatment facilities. It talks about any facility  
6 where medical treatment takes place. That is the  
7 definition of a clinical trial location. That's why  
8 there are doctors there. For example, one of the issues  
9 she raised was what about people that could have an  
10 allergic reaction to something in the vaccine. They  
11 have to have special protocols to treat those people on  
12 the scene -- to diagnosis it and treat it. That sounds  
13 like a treatment facility. They attempt to borrow from  
14 other statutes and suggest that maybe this is a very  
15 narrow statute.

16           If you have any doubt about what the Texas  
17 state position is on whether or not what's been  
18 happening here is relevant under Texas state law, the  
19 attorney general of the State of Texas is currently  
20 suing Pfizer over the falsification of information and  
21 false public marketing of the vaccine as safe and  
22 effective when it was neither. So that's the official  
23 position of the state government. This law is here to  
24 protect anybody in the healthcare context. If you see  
25 something wrong, you can report it without being fired.

1 It's an exception to the at will provision by statute.

2 Now, if this Court concludes that that  
3 statute is narrow and not as broad as we suggest, that  
4 is the only reason we request the -- a move to amend to  
5 add the general public policy exception to termination.  
6 It says wrongful termination, violation of public  
7 policy, if they're trying to force you to do something  
8 illegal, that is outside the at will doctrine. We  
9 believe the Texas Health and Safety Code statute already  
10 specifically addresses this. But if the Court doesn't  
11 believe it does so, we're only asking for leave to  
12 amend. Not to change any facts, but simply to change  
13 the legal theory by which remedy can be afforded because  
14 the Texas courts do allow that remedy.

15 It is not a case where federal law and Texas  
16 law completely shuts out the ordinary American from  
17 getting relief and remedy when they expose one of the  
18 biggest frauds and scandals in the history of American  
19 public health.

20 Thank you, your Honor.

21 THE COURT: All right. Thank you very much.  
22 All right. Nothing like teamwork.

23 MR. FRIEDMAN: And not only that, I hope that  
24 we can keep in mind what Mr. Barnes said as the final  
25 statement because that's a closing. That's a closing.

1 I just wanted to point out two issues just to make sure  
2 to complete the record.

3 THE COURT: Yes.

4 MR. FRIEDMAN: One of your questions was how  
5 are the allegations specific to the other defendants  
6 including, I imagine, Icon. In this case we definitely  
7 alleged a lot of very specific issues about what Icon in  
8 its role in this -- and they're summarized -- I won't go  
9 over them, but they're summarized on Page 29 and 30 of  
10 our opposition to the brief. But Icon was responsible  
11 for data management. And the data manipulation is  
12 exactly what this case is about. So not only is Pfizer  
13 responsible and Ventavia was the one that was performing  
14 the work, but Icon was the one that was responsible for  
15 making sure the data integrity and they were responsible  
16 for looking for the red flags and they failed.

17 The other issue I wanted to talk about is  
18 materiality. And that is -- their argument is if the  
19 FDA decided that it was -- met the EUA standards, then  
20 that's the end of it. And it -- and they can still look  
21 at it. So it doesn't matter what she has to say. If  
22 they listen to what Brook Jackson had to say and they  
23 made a decision that it is -- that it meets the EUA  
24 standards, that's enough. As if one single lawyer at  
25 the FDA gets to make the decision as to whether or not

1 Congress's standards have been met. And that is  
2 incorrect.

3           In the EUA statute, it sets forth not a  
4 subjective standard, but an objective standard. And I  
5 think a lot of the people in the -- in America that's  
6 following this case and following the problems with  
7 the -- with the -- and with Pfizer's defenses, which is,  
8 no, it only takes approval from one person and that's  
9 good enough. They don't understand the way the law  
10 works the way some lawyers do. And lawyers see the  
11 statute. And the statute says that the decision to  
12 issue the EUA has to be based on a totality of  
13 scientific evidence available to the secretary,  
14 including data from an adequate and well-controlled  
15 clinical trial, if available. It is reasonable to  
16 believe that the product may be effective in preventing  
17 the disease and that the known and potential benefits of  
18 the product when used to prevent outweigh the known and  
19 potential risks.

20           That is reason to believe. It's not enough  
21 that some bureaucrat says I believe it. There has to be  
22 a reasonable basis. That's Congress's way of telling  
23 lawyers and judges that we are looking for objective  
24 basis. Not subjective basis. And so the falsities that  
25 Brook Jackson has revealed and that when we filed the

1 statement of interest roadmap that led us to this  
2 lectern today, it's because those evidence is the  
3 objective basis for the EUA. And that's what they lied  
4 about. So even if they could convince the FDA even  
5 today to want to have this case dismissed, that's not  
6 consistent. Congress wanted objective standards to be  
7 applied in this circumstance.

8 But, please, keep in mind, Judge,  
9 Mr. Barnes's concluding because he's the closer.

10 THE COURT: I understand.

11 MR. FRIEDMAN: Thank you. Very good.

12 Any further response?

13 MS. MCDONALD: Your Honor, just briefly I  
14 wanted to address Mr. Barnes's comments about the  
15 retaliation claims. Mr. Barnes argues that essentially  
16 because they believe they've cured the pleading  
17 deficiencies as to the fraud claims under the FCA that  
18 similarly the deficiencies as to the retaliation claim  
19 have been cured. But that's just simply not the case.  
20 The retaliation provision isn't concerned with the  
21 validity of a False Claims Act theory. The question is  
22 really, as you pointed out in your original order  
23 dismissing, whether relator internally reported concerns  
24 about false claims to the government for payment. And  
25 in the Fifth Circuit, it makes no difference what the



1 relator believed. It's whether she reported it to her  
2 employer, and they do not allege such a report.

3 Similarly, as to -- Mr. Barnes discussed her  
4 report to the FDA, but they never allege in their second  
5 amended complaint that Ventavia knew about her FDA  
6 report before she was fired. And, in fact, it did not.  
7 And as to the state statute, you know, any position the  
8 State of Texas has with respect to the COVID vaccine and  
9 any of the defendants is not relevant to this  
10 retaliation provision in the state statute. It is not a  
11 broad statute. It's a very narrow statute as you'll see  
12 by reading the cases referenced in our brief, which  
13 specifically addresses this issue. And, your Honor,  
14 they could have included the common law claim as an  
15 alternative legal theory had they wanted to when they  
16 filed the second amended complaint and they did not.

17 So with that, your Honor, I respectfully  
18 request that you grant our motion.

19 THE COURT: All right. Thank you very much.

20 Any further comments from the defendants?

21 Okay. Is there anything else at this  
22 juncture that needs to be brought to the Court's  
23 attention?

24 MR. BARNES: Not from the relator, your  
25 Honor.

1 THE COURT: Not from the defendants,  
2 Mr. Carroll; is that correct?

3 MR. CARROLL: No, your Honor.

4 THE COURT: The government?

5 MR. GILLINGHAM: Nothing from the government,  
6 your Honor.

7 THE COURT: All right. Well, I want to thank  
8 you all for coming. Everyone has done an outstanding  
9 job as always. The lawyers in this case are always very  
10 well prepared, and the Court appreciates that. And I  
11 also notice there are a number of folks here who have  
12 been listening very intently. I would love to invite  
13 you to come back to be jurors some day because you're  
14 good listeners and we always need good listeners in the  
15 jury box.

16 But with that, with no further business, we  
17 are now adjourned.

18 (Proceedings adjourned at 4:42 p.m.)

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COURT REPORTER'S CERTIFICATION.

I hereby certify that on this date,  
June 6, 2024, the foregoing is a correct transcript of  
the record of proceedings in the above-entitled case.



APRIL D. HARGETT  
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Eastern District of Texas  
Beaumont, Texas